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APPENDIX A

William Earl Stacy,
Petitioner-Appellee,

v.

Aileen Love, Warden; William Leech,
Attorney General of the State of Tennessee,
Respondent-Appellant.

No. 81-5312.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 28, 1982.

Decided June 3, 1982.

Petitioner, who was sentenced to life imprisonment following first-degree murder conviction, sought habeas corpus relief. The United States District Court for the Middle District of Tennessee, Morton, Chief Judge, 528 F.Supp. 38, granted writ, and state appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that where in rebuttal to defendant's four expert and lay witnesses detailing depth of defendant's mental illness the state called a single witness who was not personally familiar with defendant's problem and could only respond to what was aptly characterized as a "rambling court-supplemented, lawyer-amended hypothetical question of questionable competence" by stating that in his opinion the hypothetical individual, meaning defendant, could appreciate the wrongfulness of his conduct, state failed to present any evidence of defendant's ability to conform his conduct to requirements of the law and, thus, failed to meet burden of proving that the defendant was sane beyond a reasonable doubt.

Affirmed.

Hillman, District Judge, sitting by designation, concurred with opinion.

Weick, Senior Circuit Judge, dissented with opinion.

1. Constitutional Law (key) 266(7)

Due process requires state to prove, beyond reasonable doubt, every element of offense charged. U.S.C.A.Const. Amends. 5, 14.

2. Criminal Law (key) 1144.13(3), 1159.2(7)

Where defendant challenges sufficiency of state's evidence, court must ask whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

3. Criminal Law (key) 570(1)

Where in rebuttal to defendant's four expert and lay witnesses detailing depth of defendant's mental illness the state called a single witness who was not personally familiar with defendant's problem and could only respond to what was aptly characterized as a "rambling court-supplemented, lawyer-amended hypothetical question of questionable competence" by stating that in his opinion the hypothetical individual, meaning defendant, could appreciate the wrongfulness of his conduct, state failed to present any evidence of defendant's ability to conform his conduct to requirements of the law and, thus, failed to meet burden of proving that defendant was sane beyond a reasonable doubt. U.S.C.A.Const.Amends. 5, 14.

4. Criminal Law (key) 311, 331

Under Tennessee law, criminal defendant who relies on insanity defense must first present prima facie case of mental illness and if he succeeds the usual presumption of sanity falls and burden shifts to state to prove, beyond a reasonable doubt, that defendant was sane and, thus, under these circumstances, sanity becomes an element of crime.

5. Constitutional Law (key) 266(7)

Constitution does not compel state to adopt burden shifting principle on issue of criminal capacity; burden of proving insanity could constitutionally remain at all times on defendant.

6. Criminal Law (key) 331

Once state of Tennessee embraced burden shifting principle on issue of criminal capacity, state was obligated to follow it. U.S.C.A.Const.Amends. 5, 14.

7. Criminal Law (key) 624

To prove sanity under Tennessee law, prosecution must show that defendant could appreciate the wrongfulness of his conduct and had capacity to conform his conduct to requirements of the law.

8. Constitutional Law (key) 266(7)

Where state bears burden of proving defendant sane beyond a reasonable doubt and fails to present any evidence which addresses essential elements of legal-test of insanity, conviction is repugnant to due process and must be reversed. U.S.C.A. Const.Amends. 5, 14.

William M. Leech, Jr., Atty. Gen. of Tennessee, Nashville, Tenn., Robert L. Jolley, Jr. Asst. Atty. Gen., for respondent-appellant.

Walter C. Kurtz, Public Defender, Nashville, Tenn. (court-appointed), for petitioner-appellee.

Before MARTIN, Circuit Judge, WEICK, Senior Circuit Judge, and HILLMAN, District Judge.*

BOYCE F. MARTIN, Jr., Circuit Judge.

The State of Tennessee appeals an order of the United States District Court for Middle Tennessee, granting Stacy's writ of habeas corpus pursuant to 28 U.S.C. § 2254. In February of 1978, Stacy was convicted of first degree murder and sentenced to life imprisonment by a Knox County, Tennessee jury. After an unsuccessful appeal to the court of Criminal Appeals of Tennessee, Stacy petitioned for and was granted a writ of certiorari by the Tennessee Supreme Court which also affirmed his conviction, over a vigorous dissent, in a decision reported as *State* v. *Stacy*, 601 S.W.2d 696 (Tenn. 1980). After exhausting all his state remedies, Stacy filed this petition alleging *inter alia*, that his conviction was unconstitutional because it was not supported by sufficient evidence. *See Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). More specifically he argued, and the District court agreed, that the state had failed to produce sufficient evidence from which any rational trier of fact could conclude, beyond a reasonable doubt, that Stacy was sane when he shot his victim, a Greyhound Bus Lines ticket teller.

The relevant facts of this case are simple. Stacy is a chronic schizophrenic. The defense presented overwhelming evidence to

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* Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

that effect. Prior to the shooting, Stacy had twice been hospitalized for significant periods of time. He was so mentally ill that upon entering these institutions he could not meaningfully participate in psychological testing. Stacy hallucinated, saw ghosts, and in general could not act in a socially acceptable manner. While hospitalized he would sometimes wander the hallways all night talking to himself. Acquaintances testified to his blank stare, continual nervousness, and inappropriate laughter. At trial, psychiatrists described schizophrenia as an inability to remain in contact with reality and the record evidence depicts Stacy displaying that symptom at every turn. Yet his condition could be, and effectively was, controlled with drugs. If kept in a controlled environment and properly medicated, Stacy was able to contribute to the hospital work force. Without the drugs however, his condition, as one psychiatrist testified, would immediately begin to disintegrate.

Stacy's first hospitalization occurred near the end of a prison term he was serving in August 1974. The authorities feared that Stacy, then in the psychotic ward, would be dangerous to himself and others if returned to society, and arranged for his transfer to Central Tennessee State Hospital. At Central State, he was diagnosed as schizophrenic and remained under voluntary commitment until October 1974.

Stacy returned to Central State in March 1975 pursuant to a court order following his arrest for burglary. After undergoing treatment, he was brought to the Knox County Criminal Court on July 8, 1975, where Judge Ford found him incompetent to stand trial and ordered him committed to Eastern State Hospital for an indefinite period. Judge Ford would later testify at Stacy's murder trial that he believed Stacy was seriously mentally ill at the time.

Stacy entered Eastern State immediately but was, inexplicably, released after a brief stay on July 23, 1975, seven days

prior to the murder. The Knox County court was neither notified nor asked to authorize his release even though Stacy, as a criminal defendant, was at that time a ward of the state. Worse, Stacy was released without his medication and without the normal aftercare appointment. His sister, Kathy, testified that upon discharge his condition was so badly deteriorated that, fearing he might have escaped, she called the hospital to confirm that he had in fact been discharged.

Stacy spent the next seven days at his sister's home. She testified that his behavior during this period was quite strange. He was nervous, seemed to be in his own world, and would laugh and giggle for no apparent reason. At night, he saw ghosts and tried to convince her that they inhabited the house. Occasionally he would wander around the house nude in front of her, her children, and neighbors. She came upon him one evening holding an empty revolver to her son's head, threatening to blow his brains out.

On the morning of July 30, 1975, Stacy met up with an old acquaintance, Carlton Swift, and a new one, Ira Minifee. They spent the day together riding around in Swift's car. Minifee later testified to Stacy's unusual and inappropriate behavior during the course of the day. At approximately nine o'clock that evening, Swift pulled up to the Greyhound Bus terminal in Knoxville stating that he wanted to go inside to use the restroom and purchase some cigarettes. Stacy accompanied him. Shortly after they entered, a Greyhound ticket teller was fatally shot once in the throat, apparently in the course of a robbery attempt. Although no one actually witnessed the shooting, bus patrons testified to seeing Swift and Stacy flee the scene. Upon returning to the car, Stacy told Minifee that he had just shot someone, a statement he would subsequently repeat to others. Later that evening, Swift and Minifee were arrested after an automobile chase. Stacy, who was in Swift's car, managed to escape and was not apprehended until several weeks later at which time he was jailed and then rehospitalized.

At trial, Stacy pled not guilty be reason of insanity. The defense presented four expert and several lay witnesses who detailed the depth of Stacy's mental illness. Typical of the expert testimony was that of Dr. Luton. The, late, former Justice Joe Henry of the Tennessee Supreme Court accurately summarized Dr. Luton's contribution in his eloquent opinion:

> The defendant called Dr. Frank L. Luton, the Assistant Superintendent for Clinical Psychiatric Services at the Middle Tennessee Health Institute. Dr. Luton has practiced psychiatry for forty-eight years. His career has been remarkable. His background includes graduation from the Medical School at Vanderbilt, four years of postgraduate training at Johns Hopkins, training in London, further training in Boston and as a teacher of psychiatry at Vanderbilt. He has been professer emeritus at Vanderbilt since 1963. We consider his testimony to be significant and conclusive.
>
> Dr. Luton was throughly familiar with all records pertaining to defendant and had interviewed and evaluated him on numerous occasions. He diagnosed his condition as "schizophrenic, *chronic* undifferentiated type."
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> Dr. Luton's testimony sheds substantial light on the medication question. He testified that "[w]hen he's not medicated, he becomes grossly psychotic, grossly ill, mentally ill." He testified that with medication defendant "behaves in a relatively normal fashion," but that he cannot be trusted to take his medication—"[h]e gets the idea that he doesn't need it any longer."
>
> Basing his testimony on his own examinations he voiced the opinion that at the time of the murder defendant "was

> mentally sick, seriously, at that time." He testified that his condition was "chronic" and that it "goes back to the time when he committed the act and [that] at that time he was *not able to judge the nature of his act.*" (Emphasis supplied). Further, he was "not able to conform" his conduct to the requirements of the law. It is evident from Dr. Luton's testimony that defendant is dangerously psychotic when off his medication and yet he was released from the East Tennessee Mental Health Institute (Eastern State Hospital) without medication. As Dr. Luton phrased it, "the minute he quits taking his medicine, he's losing ground."

State v. *Stacy, supra,* 601 S.W.2d at 700.

In rebuttal, the state called a single witness, Dr. Beasley. Beasley, who was not personally familiar with Stacy's problem, could only respond to what Justice Henry aptly characterized as a "rambling, court-supplemented, lawyer-amended hypothetical question of questionable competence." *Id.* at 702. Dr. Beasley stated that in his opinion the hypothetical individual, meaning Stacy, could appreciate the wrongfulness of his conduct. All remaining portions of his testimony were, as Justice Henry noted, properly stricken by the trial judge. *Id.* As a result, the case was submitted to the jury with no evidence of Stacy's ability to conform his conduct to the requirements of the law, which together with the awareness of right and wrong constitutes Tennessee's test of insanity. It was on the basis of this failure of proof that the District Court, in an exhaustive opinion published at 528 F.Supp. 38 (M.D.Tenn.1981), granted Stacy's petition.

We are deeply troubled by the implications of this case. Like the court below, we are acutely aware that overturning Stacy's conviction for insufficient evidence operates as an acquittal and thereby calls into effect the constitutional proscription against

double jeopardy. *United States* v. *Burks*, 437 U.S. 1, 17—18, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978). Thus, granting this petition not only frees William Stacy but bars his retrial as well. This is an alarming result, for we entertain no doubt that Stacy, if left in an uncontrolled environment and without benefit of medication, remains a source of potential danger to his fellow citizens.

[1—3] It is nevertheless our duty to enforce the rights Stacy enjoys under the Constitution. Due process requires the state to prove, beyond a reasonable doubt, every element of the offense charged, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where, as here, a defendant challenges the sufficiency of the state's evidence, we must ask:

> Whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (court's emphasis).

Jackson v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). We consider that our review is further refined by *Fuller* v. *Anderson*, 662 F.2d 420 (6th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1734, 72 L.Ed.2d 150 (1982), which cautions that, as Justice Stevens pointed out in his response to the denial of certiorari, we must "review the evidence in the light most favorable to the prosecution." 662 F.2d at 423. We have examined the record below with great care and can only conclude that the District Court was correct in holding that the state failed to sustain this burden.

[4—6] Under Tennessee law, a criminal defendant who relies on the insanity defense must first present a *prima facie* case of mental illness. If he succeeds the usual presumption of sanity dissolves and the burden shifts to the state to prove, beyond a reasonable doubt, that the defendant was sane. *Graham* v.

State, 547 S.W.2d 531, 544 (Tenn.1977). Thus, under these circumstances, sanity becomes an element of the crime. We note that the Constitution does *not compel* a state to adopt this burden shifting principle on the issue of criminal capacity. The burden of proving insanity *could* constitutionally remain at all times on the defendant. *Leland* v. *Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). Having embraced this rule, however, the State of Tennessee is obligated to follow it. It did not do so in Stacy's case.

Graham, supra, offers the following definition of insanity:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct *or* to conform his conduct to the requirement of the law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

547 S.W.2d at 543 (emphasis added).

[7] Thus, to prove sanity, the prosecution must disprove both parts of the *Graham* insanity test. That is, it must show that the defendant could appreciate the wrongfulness of his conduct *and* had the capacity to conform his conduct to the requirements of the law.

As we noted in our summary of the facts, the state presented expert testimony on the first portion of the test, the old *McNaghten*[1] "right and wrong" principle. No testimony, lay or expert, was offered to prove the second portion: Stacy's ability

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[1] *M'Naughten's Case,* 8 Eng.Rep. 718 (H.L. 1943).

to conform his conduct to the rquirements of the law. The prosecution simply failed to present any evidence whatsoever on this point. The state's rebuttal to the defense's very substantial *prima facie* case consisted entirely of Dr. Beasley's answer to a hypothetical question based on the *McNaghten* inquiry.

In upholding Stacy's conviction, the Tennessee Supreme Court pointed to certain evidence and held that the jury could have inferred the answer to the second, unaddressed part of the Graham test from these facts alone. The majority opinion characterized the murder and attempted robbery as "planned and deliberate." *State* v. *Stacy, supra,* 601 S.W.2d 696, 697. It stressed that after shooting his "intended" victim, Stacy recognized what he had done, fled and evaded police for several weeks. *Id.* Furthermore, the majority attempted to cast doubt on the role played by Stacy's medication when they noted that he was off it "for only a short period of time, if at all." *Id.* Finally, the court concluded that his conduct at or about the time of the murder "does not even compare remotely with the conduct described when he was totally psychotic or out of touch with reality." *Id.*

We simply cannot accept any of these observations as a basis for upholding Stacy's conviction. In the first place, there was no evidence whatsoever that Stacy "planned" to rob the Greyhound station. No money was in fact taken and the robbery charge was dismissed at trial. Minifee testified only that Swift pulled up to the station, announced that he was going inside to buy some cigarettes and use the bathroom, and that Stacy accompanied him. While those "plans" certainly changed at some juncture, the point is that there was no evidence of "planning" on Stacy's part from which a jury might have inferred that Stacy possessed the requisite mental capacity.

Second, with respect to Stacy's flight from the scene of the crime, we must agree with Justice Henry's comment:

> The short and simple answer to this is that any fool faced with fear and foreboding can flee and hide. Such is the nature of even a wild beast.
>
> . . . .
>
> [But] Tennessee does not subscribe to the "wild beast" test of insanity, under which the defendant is held responsible unless wholly deprived of understanding and memory so as not to know what he was doing.

State v. *Stacy*, 601 S.W.2d at 703.

Third, Minifee, Kathy Stacy, and Regina Mack, who, like Minifee, was a witness for the prosecution, testified at length to Stacy's inappropriate and abnormal behavior during the seven days between his release from Eastern State Hospital and the shooting. Much of this testimony pertained to unusual behavior on the very day of the shooting. Moreover, the man who shared Stacy's cell after his arrest recounted Stacy's delusion that he was a member of the President's Cabinet and described his habit of standing naked in the cell with toilet paper stuffed in his nostrils. With a concision and clarity rarely associated with the interface of law and psychiatry, the cellmate described Stacy's condition shortly after his arrest: "he ain't got good sense, he's crazy."

Fourth, the state offered no evidence of Stacy possessing or taking his medication during the interim between his release and the shooting. Instead, the unrebutted evidence showed that he left Eastern State with no medication and no prescription. Not one witness who had contact with Stacy for more than a brief period testified to normal behavior on his part outside an institution. Stacy had failed in school. There was no evidence of his ever holding an ouside job. Almost all his young adult life appears to have been spent in some form of public institution. Only when Stacy was hospitalized and medicated were witnesses

able to say that he conducted himself in a socially acceptable manner.

[8] In summary, the record is simply devoid of any evidence that Stacy had the ability to conform his conduct to the requirements of the law. Where, as here, the state bears the burden of proving the defendant sane beyond a reasonable doubt and fails to present any evidence which addresses an essential element of the legal test of insanity, a conviction is repugnant to due process and must be reversed.

Accordingly, we hold that the District court properly granted petitioner's writ. Our ruling today means that William Stacy must be released from prison and may not be retried. *See United States v. Burks*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). We can only hope that the state will exercise its power to commit this man to a psychiatric hospital until he displays the ability to live peacefully in our society.

Judgment affirmed.

DOUGLAS W. HILLMAN, District Judge, concurring:

This court today affirms an order of the United States District Court for the Middle district of Tennessee granting Stacy's writ of habeas corpus, pursuant to 28 U.S.C. § 2254. In his dissent, Senior Circuit Judge Weick, quoting Chief Justice Burger, implies that the majority has either ignored or forgotten that it is for the jury, not the judge, to make factual findings. In addition, Judge Weick has produced a scoreboard, listing those individuals, presumably found by the decision of this court to have acted irrationally in having found Stacy able to conform his conduct to the requirements of the law. Specifically, Judge Weick says:

> "In other words the 12 jurors were not rational, the trial judge who entered judgement on the guilty verdict was not

> rational, the three judges on the Court of Criminal Appeals were not rational, and the three Justices on the Supreme Court of Tennessee were not rational. The result is that only the two dissenters on the Supreme Court of Tennessee and the district judge were rational."

These allegations warrant a response.

It is axiomatic that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

Here, Stacy relied upon the defense of lack of mental capacity. Under Tennessee law, having made out a prima facie case of lacking the requisite mental capacity, he could not be convicted except upon proof beyond a reasonable doubt that he was sane at the time of the crime. *Graham* v. *State,* 547 S.W.2d 531 (Tenn.1977). Petitioner was convicted of murder in the first degree. In his habeas petition, Stacy is confronted with two legal hurdles: First the language of section 2254(d) itself provides that a factual determination by a state court shall be presumed to be correct unless "(8) . . . the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record." Secondly, his petition will be denied if the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. Or, in the language of *Jackson* v. *Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979), " . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Also, of course, the evidence must be viewed in the light most favorable to the prosecution. The difficulty arises in the application of the rule.

In this case, as pointed out by Judge Weick, a jury of 12 unanimously found Stacy sane "beyond a reasonable doubt" and that finding was affirmed both by the Tennessee Court of Criminal Appeals and a divided (3—2) Tennessee Supreme Court. Do those facts, as Judge Weick implies, conclude the matter? How does a federal judge determine whether an individual or a group of individuals have acted rationally?

The problem facing the federal courts is highlighted by *Fuller* v. *Anderson,* 662 F.2d 420 (6th Cir. 1981), *cert. denied* ____ U.S. ____, 102 S.Ct. 1734, 72 L.Ed.2d 150 (1982), where an experienced and distinguished Chief U. S. District Judge concluded that insufficient evidence existed in the record to conclude petitioner had intended to commit a crime. Specifically, in that case, it was his considered judgment that no rational juror could find from the record the requisite intent required in a charge of first degree murder. A majority of this Court agreed, Judge Weick dissenting. Yet on the same identical record, in a dissent to the denial of certiorari, the Chief Justice of the United States said: "It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally."

Although trial by jury is the linchpin of our judicial system, nevertheless no system is infallible. As Justice Steward said in *Jackson, supra,* "A properly instructed jury may occasionally convict when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." All trial lawyers, as well as judges, know that on occasion and with no logical explanation, juries occasionally go haywire. Undoubtedly, such factors as the nature of the crime, a fear or hatred of the accused, pretrial publicity, outstanding advocacy, public uproar, and notoriety of the parties could, and on occasion do, produce such results. To conclude categorically that because of a unanimous verdict a jury has acted rationally seems to me to fly in the face of understandable human passions and frailties.

Jackson requires more than a tally sheet. It mandates an independent review of the evidence to determine whether the evidence reasonably supports a finding of guilty beyond a rasonable doubt. No two cases are alike. Presumably, each case must be decided on its own facts. After a careful reading of the entire record in this case, I am simply unable to say that the jury was warranted, on the evidence before it, in failing to entertain a reasonable doubt that, except for a diseased mental condition, Stacy would have killed the ticket clerk.

Judge Martin, writing for the court, has detailed the evidence surrounding Stacy's mental condition at the time of the killing. Giving the government the benefit of all legitimate inferences to be drawn from the record evidence of Stacy's mental condition, it was at best meager and inconclusive. Stacy not only made a prima facie case, but an overwhelming one. As a matter of law, the evidence produced by the State with respect to Stacy's mental condition was not enough to rebut Stacy's evidence and did not meet the Goverment's high burden.

Despite recent pleas[1] that increased deference be given to the decisions of the state court system, we are reminded by Professor Yale Kamisar, *Constitutional Law Deskbook* (1978) (published by the National College of District Attorneys), that Justice Harlan repeatedly warned that the striving for "compelled uniformity" between the State and federal criminal justice systems is not only "inconsistent with the purpose of our federal system," but that a consequence might well be a "dilution in federal law enforcement of the specific protections found in the Bill of Rights." *See, e.g.*, his dissent in *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1969).

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[1]See, e.g., Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 Iowa L.Rev. 233 (1979).

In reviewing habeas claims, we must constantly be vigilant so that constitutional values are not jeopardized in any way, and it is that vigilance which today leads me to concur in the majority opinion.

WEICK, Senior Circuit Judge, dissenting:

I respectfully dissent. This appeal presents the spectacle of a single district judge, in a habeas corpus proceeding, granting the writ and overturning the judgment of conviction in the Criminal Court of Knox County, Tennessee, entered by the judge upon a unanimous verdict of guilty of twelve jurors of murder in the first degree in the perpetration of robbery, which judgment was affirmed by the Court of Criminal Appeals of Tennessee and by a divided Supreme Court of Tennessee.

The robbery was perpetrated by Stacy and two confederates. Stacy, who had a criminal record, did the shooting and his defense was insanity. Stacy had sense enough to flee after the robbery and shooting and was not apprehended until sometime later. The confederates did not claim to be insane. The facts are set forth in the opinion of the Court of Criminal Appeals and the majority opinion of the Supreme Court of Tennessee and they are binding on the federal courts in habeas proceedings.

The district court also detailed the facts in a 51 page opinion in which it acted as an appellate judge reviewing as upon direct appeal. It had no appellate jurisdiction as a habeas petition constitutes a collateral attack upon the judgment of conviction. The district judge did rely on *Jackson* v. *Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and closed with the statement that no rational trier of facts could have found proof of guilt beyond a rasonable doubt. In other words, the twelve jurors were not rational, the trial judge who entered judgment on the guilty verdict was not rational, the three judges on the Court of Criminal Appeals were not rational, and the three Justices on

the Supreme Court of Tennessee were not rational. The result is that only the two dissenters on the Supreme Court of Tennessee and the district judge were rational.

It was not disputed at the criminal trial that a jury issue was presented. Stacy did have mental problems, but they were controllable by medication and he then acted normally. He also had been admitted at different times to three mental institutions, but was last released from the F. S. D. unit of the maximum psychiatric unit at Middle Tennessee State because he was no longer in need of high security. He was described in hospital records as being "one of our best patients" who got along well with the staff, had a very pleasant attitude and was a model.

Reliance upon our decision by a divided court in the Michigan habeas corpus case of *Fuller* v. *Anderson*, 662 F.2d 420 (6th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1734, 72 L.Ed.2d 150 (1982) is misplaced. The fact that the Supreme Court denied certiorari in *Fuller* does not mean that the Supreme Court approved our decision. Justice Stevens in his response to the denial of certiorari stated his belief "that *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 was decided incorrectly." ____ U.S. ____, 102 S.Ct. 1734, 72 L.Ed.2d 150.

It is noteworthy that Chief Justice Burger, joined by Associate Justice O'Connor, dissented from the denial of certiorari. Chief Justice Burger stated, *inter alia:*

> The District Court and the Court of Appeals incorrectly applied Jackson. There we held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S.Ct. at 2789. It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally. With all respect, I suggest that the District Court and the Court of Appeals' majority

forgot that it is the function of the jury to determine who is telling the truth. Judges betray their function when they arrogate themselves over the legal factfinder. Either we accept the jury system with the risk of human fallibility or we ought to change the structure of the system and redefine the standard of review under the habeas corpus statutes. The District Court and the Court of Appeals did not view the evidence in the light most favorable to the prosecution, as the law and their oaths require. If they had, they could not have rationally concluded that the jury could not reasonably reach the result it reached. Instead, the courts reweighed Coleman's testimony, noting that he was young, that he had been placed in a youth house because he ran away from home, and that he attended a "special shcool." Put simply—and bluntly, as this case demands—the federal judges who set aside this state court judgment acted like jurors, not jurists.

This Court cannot sit as a court of errors to correct every mistake by other courts. But the decision here warrants consideration by this Court because the courts have misapplied Jackson in a way that threatens to lead to reversals of state court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact. There was a flagrant refusal here to review the evidence in the light most favorable to the prosecution, as the law commands. Jackson did not authorize such gross interference with the functioning of state criminal justice systems.

I would grant certiorari and reverse the decision below, with appropriate reminders to our colleagues as to certain fundamental propositions concerning their role. Our heavy docket is an insufficient reason to allow this erroneous judgment to stand. ____ U.S. ____, ____, 102 S.Ct. 1734, 72 L.Ed.2d 150.

In my opinion, Chief Justice Burger has correctly stated the law and we should follow his decision. We should also follow the decision of the Supreme Court of the United States in *Bergman* v. *Burton,* ____ U.S. ____, 102 S.Ct. 2026, 71 L.Ed.2d ____, which decision summarily vacated our opinion in *Bergman* v. *Burton,* 649 F.2d 428 (6th Cir. 1981) and remanded to us for further consideration in light of *Rose* v. *Lundy,* 455 U.S. ____, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

APPENDIX B

William Earl Stacy

v.

Aileen Love, et al.

No. 80-3461-NA-CV.

United States District Court,
M. D. Tennessee
Nashville Division.

March 31, 1981.

Petitioner, who was sentenced to life imprisonment following first-degree murder conviction, sought habeas corpus relief. The District Court, Morton, Chief Judge, held that state failed to prove beyond reasonable doubt that petitioner, at time of alleged offense, could conform his conduct to the requirements of the law, in view of lack of any evidence that petitioner was taking medication or even had access to medication at time of the killing and in view of unrebutted expert evidence that petitioner could not conform his conduct to the requirements of the law at time of the killing.

Ordered accordingly.

1. Constitutional Law (key) 255(5)

Criminal committees must be afforded same due process rights as civil committees including precommitment hearing and periodic examinations at reasonable intervals; as soon as committee's condition warrants, he must be released.

2. Habeas Corpus (key) 92(1)

In habeas corpus proceeding, Tennessee law was determinative of issue of petitioner's sanity at time of alleged offense.

3. Criminal Law (key) 570(2)

Under Tennessee law, once evidence adduced by either defense or prosecution raises reasonable doubt as to sanity of defendant, burden then shifts to state to prove defendant's sanity beyond reasonable doubt as an essential element of the crime.

4. Criminal Law (key) 773(2)

Jury was properly instructed as to insanity defense.

5. Ciminal Law (key) 570(2)

Where defendant presented compelling case of mental derangement at trial, burden shifted to state to prove beyond reasonable doubt that defendant was sane at time crime was committed.

6. Habeas Corpus (key) 85.5(1)

State failed to prove beyond reasonable doubt that petitioner, at time of alleged offense, could conform his conduct to the requirements of the law, in view of lack of any evidence that petitioner was taking medication or even had access to medication at time of the killing and in view of unrebutted expert evidence that petitioner could not conform his conduct to the requirements of the law at time of the killing.

Walter Kurtz, Metro Public Defender, Nashville, Tenn., for petitioner.

William Leech, Atty. Gen., Nashville, Tenn., for the State of Tenn.

Robert Jolley, Jr., Nashville, Tenn., for respondent.

MEMORANDUM

MORTON, Chief Judge.

Oral argument in this case was heard on March 18, 1981.

The petitioner was sentenced to life imprisonment following his conviction for first degree murder in connection with a slaying in a Knoxville bus station in 1975. His conviction was affirmed by the Court of Criminal Appeals. A divided Tennessee Supreme Court affirmed the court of appeals in a three-to-two decision. The late Justice Joseph W. Henry, in his last opinion, penned a ringing dissent in response to the brief majority opinion. The matter is now before the district court as a petition for habeas corpus pursuant to 28 U.S.C. § 2254.

The petitioner asserts three grounds for relief. First, he claims that the state failed to prove the petitioner's sanity at the time of the offense beyond a reasonable doubt after his sanity had been brought into question. Secondly, he asserts that evidence of murder in the first degree was not sustained because premeditation was not proved beyond a reasonable doubt. Lastly, the petitioner complains of the admission over objection of hearsay statements allegedly made by a co-defendant who was not on trial and who did not testify.

The testimony will be reviewed in detail.

BACKGROUND

Petitioner is a young man who has been in and out of mental institutions since 1974. The following are the relevant dates of the petitioner's admissions at mental institutions and the events of this cause.[1]

November 9, 1971—Petitioner sentenced to 3-5 years for burglary and shoplifting.

August 13, 1974—First admitted to Forensic Services Division, Central State Hospital, from the State Penitentiary.

October 18, 1974—Transferred to Eastern State Hospital.

October 23, 1974—Discharged from Eastern State Psychiatric Hospital.

March 5, 1975—Second admission to Forensic Services Division, Central State Hospital, from Knox County Criminal Court.

July 1, 1975—Sent from Forensic Services Division to Knox County Jail for court hearing.

July 8, 1975—Incompetency and Commitment Hearing before Judge Richard R. Ford; represented by Mr. Kim Tollison.

July 10, 1975—Pursuant to T.C.A.§§ 33-708, 33-604, admitted to Eastern State Hospital for indefinate period.

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[1]These dates were received from the testimony of Mr. John Gerdes, Director of the Forensic Services Division, Central State Hospital.

July 23, 1975—Discharged from Eastern State.

July 30, 1975—Shooting at Greyhound Bus Terminal.

August 1975—Petitioner arrested in Nashville, Tennessee.

February 17, 1976—Judge Ford ordered petitioner returned to the Forensic Services Division, Central State Hospital.

March 9. 1976—Petitioner returned to Forensic Services Division for third time.

Sept. 30, 1976—Held at Eastern State Hospital temporarily awaiting court hearing.

October 18, 1976—Petitioner returned to Forensic Services Division by Judge Joseph J. Nigro pursuant to TCA §§ 33-708, 33-604.

August 4, 1977—Petitioner found competent to stand trial by Court of Criminal Appeals. *State of Tennessee* v. *Stacy*, 556 S.W.2d 552 (1977).

October 11, 1977—Petition for Certiorari denied by Tennessee Supreme Court.

December 18, 1977—Petitioner sent from Forensic Services Division to Knox County Jail to await trial.

The petitioner was first admitted to Central State Hospital on August 13, 1974. He had become psychotic in the penitentiary and was on the psychiatric ward at the Tennessee State Prison before he was admitted to the Forensic Services Division (Hereinafter referred to as F.S.D.). There he was given major tranquilizing medication. Shortly after he was admitted to F.S.D., the Department of Corrections notified F.S.D. that petitioner was eligible for mandatory release. On August 21,

1974, eleven days after he was admitted, Mr. Stacy signed a voluntary admission to Eastern State Hospital. During the petitioner's first admission to F.S.D., he was diagnosed as mentally ill, schizophrenic.

Petitioner was transferred to Eastern State on October 18, 1974. He was released from that hospital on October 23, 1974.

Petitioner returned to Central State, F.S.D., for the second time on March 5, 1975. He had been sent pursuant to court order. The petitioner remained at Central State until July 1, 1975. While at F.S.D., Mr. John Gerdes, a psychological examiner, attempted to test petitioner. The attempt was unsuccessful because the petitioner was too ill to test. He was again diagnosed as schizophrenic and given tranquilizing medication. As a result of this medication, the petitioner's condition improved symptomatically, and he was returned "to court as not competent [to stand trial], judicially committable but not in need of maximum security."

On July 8, 1975, a hearing was held in Knox County Criminal Court, Division II, Judge Richard R. Ford presiding. The petitioner had a pending burglary charge before the court. (This charge had nothing to do with the present cause.) He was represented by Mr. Kim Tollison. During that hearing Dr. Cyrus Higgs, then Assistant Superintendent for Forensic Services, testified. Dr. Higgs had examined and tested petitioner during his second admission to F.S.D. (March 5, 1975—July 1, 1975). He found the petitioner to be schizophrenic. It was imperative that petitioner continue taking his medication because he could suffer a relapse if he ceased taking it. On July 8, 1975, Judge Ford found the petitioner to be incompetent pursuant to T.C.A. §§ 33-708 and 33-604 and judicially committable for an indefinate period. He considered the petitioner to be seriously mentally ill. Pursuant to the court's findings, Mr. Stacy was sent to Eastern State Psychiatric Hospital on July 10, 1975, for an indefinite period.

Petitioner remained at Eastern State until, surprisingly, he was discharged on July 23, 1975. The court was not notified, nor did the court authorize the petitioner's release. He was released without medication or prescription for medication. No aftercare appointment was made at a mental health center although such an appointment is apparently standard practice when a patient leaves the hospital.

A shooting occurred at the Greyhound Bus Terminal, Knoxville, on July 30, 1975. Mr. George Ault, an employee of Greyhound, died as a result of the shooting. Petitioner was arrested in Nashville for murder in August and returned to Knoxville.

On February 17, 1976, an additional order was issued by Judge Ford. Pursuant to that order, the petitioner was returned to F.S.D. since the shooting obviously had shown that Mr. Stacy was dangerous to himself and others.

Petitioner was admitted to Central State Psychiatric Hospital, F.S.D., for the third time on March 9, 1976, almost eight months after the murder in the bus station. His condition was much like it had been in March of 1975, and he was not amenable to psychological testing at that time. Petitioner was having a chronic episode and was mentally ill, schizophrenic. He was found to be acutely psychotic in April 1976. The petitioner was given tranquilizing medication, and on September 3, 1976, the F.S.D. staff felt that he was competent to stand trial.

On September 30, 1976, petitioner had a hearing in Knox County Criminal Court, Division I, Judge Joseph J. Nigro presiding. At that hearing, the court found petitioner incompetent, and he was returned to F.S.D. on October 18, 1976. The State appealed.

On August 4, 1977, the Tennessee Court of Criminal Appeals reversed the finding of the trial court and found petitioner com-

petent to stand trial. *State* v. *William Earl Stacy*, 556 S.W.2d 552 (Ct.Crim.App. 1977).

The Tennessee Supreme Court denied certiorari on October 11, 1977. Subsequently, petitioner was transferred from F.S.D. to the Knox County Jail to stand trial for the murder of George Ault.

THE EIGHT DAYS PRIOR TO THE CRIME

Petitioner was discharged from Eastern State Hospital on July 23, 1975. Kathy Stacy, his sister, picked him up at the hospital and petitioner lived at her home at 208, Court A, College Homes, Knoxville, until the shooting at the Greyhound Bus Terminal on July 30, 1975. He was not taking any medication during this period.

On July 30, 1975, Carlton Swift and petitioner saw Ira Minifee in Montgomery Village, Knoxville. Mr. Minifee was standing in front of Martha Mack's apartment. Minifee had known Carlton Swift for approximately one and a half years and was a good friend of Mr. Swift. He had known the petitioner for three or four days. Mr. Swift, a stout, muscular man training to box, was wearing dress pants and an athletic shirt. Petitioner, taller but not as muscular as Carlton Swift, was wearing blue jeans, a shirt and a knit hat. Minifee was on his way to work when he met Swift and the petitioner. They walked to a car lot and looked at a used car because Mr. Swift was interested in purchasing a car. After looking at some cars, Mr. Swift purchased a white Chevrolet.

Carlton Swift, Ira Minifee and petitioner went to eat breakfast. While eating, Minifee spoke with a friend who had been working with him who told Minifee that Minifee had been terminated from his job. As a result, Minifee did not go to work that day. After finishing breakfast, Swift, Minifee and the peti-

tioner drove to Carlton Swift's girlfiend's house. Later in the morning, they went to Eastern State Psychiatric Hospital to visit the petitioner's girlfriend. They then went to Chestnut Ridge, Knoxville, to the Recreation Center.

Immediately before visiting the Recreation Center, Carlton Swift hit a telephone pole with his car and knocked out a headlight. Upon leaving Chestnut Ridge, shortly after they arrived, Swift, Minifee and Mr. Stacy purchased a headlight and Minifee helped Swift repair the damaged light. Afterwards, Swift, Minifee and the petitioner drove to the Lonsdale area, Knoxville, so Carlton Swift and petitioner could visit their sisters. They remained approximately twenty minutes. After leaving Lonsdale they drove to a restaurant on Magnolia Avenue, Knoxville, and ate dinner. After eating, Swift, Minifee and petitioner drove to the Greyhound Bus Terminal, Magnolia Avenue, Knoxville. Carlton Swift, who had been driving all day, made a "U-Turn" in the middle of the street and pulled into a cab zone. He told Minifee that he was going in to get some cigarettes and use the bathroom.[2] A cab pulled up behind the car blowing its horn and the cab driver held up his hand motioning to move the car. Minifee pulled the car out of the cab parking spot and drove it around the corner. At that time, petitioner got out of the car and said that he would be right back. Petitioner then went into the bus terminal.

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[2]On cross-examination, Mr. Minifee was shown a copy of a statement which he gave the Knoxville Police Department on August 6, 1975, in which he stated that "Swift got out from under the wheel and told me he was going into the terminal to get some money." Minifee stated he did not remember making that statement although his signature was on it.

THE CRIME

Mr. George A. Ault, working as a ticket agent at the Greyhound Bus Terminal on July 30, 1975, was shot through the neck at approximately 9:00 P.M. and subsequently died. Two young black men, one muscular wearing an athletic shirt and carrying a pistol, and the other, a taller man with a knit hat, were seen standing before the ticket agent counter by Miss Frankie Lee Mitchell. She stated that the man without the gun, the taller, thinner one, was leaning upon the ticket stand with his feet appearing to be off the ground, or high on his toes. After a shot was fired, the man with the gun ran around the side of the ticket agent stand, up the steps and out the door. The other man followed him.

The firing of the pistol brought a response from Mr. Ault's fellow employees. Lawrence Townsend, the operation supervisor, was in the corner office adjacent to the terminal and immediately grabbed a club and ran into the loby. He testified that Mr. Ault was standing behind the counter with a shocked look on his face. He said to Mr. Townsend,"Larry, they shot me." Mr. Townsend ran up the stairs and out the door but did not see anyone. He then went around the dispatch office and ran into another Greyhound employee, Alice Fitch. Miss Fitch had seen Mr. Ault approximately fifteen seconds before the shooting but had walked out of the terminal to leave for home. She ran towards the terminal when she heard the shot. Townsend told her to call the police.

Mr. Townsend walked back into the terminal and upon not seeing Mr. Ault asked where he had gone. He thought that Mr. Ault had been merely wounded in the arm. When told that Mr. Ault was on the floor he went to assist him and remained with him until the ambulance arrived. None of the persons working in the bus station could identify the assailants.

POLICE INVESTIGATION OF THE CRIME

Captain Shields L. Minor, working in the Homicide Division of the Knoxville Police Department on July 30, 1975, was the chief investigating officer on the case. He received a call at approximately 9:30 P.M. to investigate a shooting at the Greyhound Bus Terminal on Magnolia Avenue. When he arrived the uniformed officers were already on the scene and he discovered that there had been a shooting. The victim, George Ault, had already been taken to St. Mary's Hospital. Captain Minor talked with Lisa Lewis, Luwanda Blackwell, and Miss Lee Mitchell, all in transit waiting on buses at the bus terminal. He also talked with all the employees at the bus terminal, but none had actually seen the shooting.

Captain Minor then proceeded to St. Mary's Hospital to attempt to get a statement from Mr. Ault. When he arrived at the Hospital, an emergency room doctor, a Dr. Nelson, was trying to perform a tracheotomy on Mr. Ault. Mr. Ault died before he had an opportunity to talk with the police.

Captain Minor subsequently tried to contact Lisa Lewis who listed her address as Salisbury, North Carolina. He traveled to Salisbury and contacted the local police department, but they were unable to locate Miss Lewis. He was informed that she had left for Kentucky. Captain Minor asked the Kentucky Highway Patrol for assistance in locating her, but she was never found.

Captain Minor was unable to contact Miss Lee Mitchell also, but he did contact Luwanda Blackwell for identification purposes. Miss Blackwell never attended any hearings in the matter. She was subpoenaed to appear before the grand jury, but she never appeared although Captain Minor personally served her with a subpoena. Captain Minor attempted to subsequently contact her through an aunt living in Knoxville, but was unable to do so.

Captain Minor was involved later in the evening of July 30, 1975, in the apprehension of suspects in the shooting. (See discussions below in Post-Offense Activities by petitioner.)

Captain Minor's investigation revealed that Mr. Ault died with a dollar bill in his hand. There was a dollar's worth of change on the counter. As a ticket agent, Mr. Ault was responsible for the ticket counter area. Specifically, he controlled two cash drawers. One cash drawer he actually worked out of while the other was used to replenish the operating drawer with cash when needed. All the agents had been instructed to keep their drawers locked except when they were using them. Mr. Ault always kept his drawers locked unless he opened it to make change for a ticket. When Mr. Townsend and Pedro Williams, another Greyhound employee, first arrived at the ticket counter after the shooting, both drawers were open. Mr. Townsend could not tell if any of the money had been disturbed. A subsequent examination found that nothing was missing.

Dr. Anthony Kattine, a pathologist working at the University of Tennessee Hospital, performed an autopsy upon Mr. George Ault on July 31, 1975. Mr. Ault had a gunshot wound in the neck which resulted in internal bleeding that blocked his air passage. Death was caused by choking as a result of the blocked air passage.

Dr. Kattine stated, "The bullet entered the neck on the left side at the level of the voice box, passed through the thyroid gland around the voice box, across the voice box and downward and it hit the collar bone on the right, broke the collar bone and destructed a major vessel causing hemorrhage in that area." Dr. Kattine further testified that with such a wound, a man could have maintained consciousness for a short period of time by coughing up enough blood to keep his throat clear before being overcome. The gunshot wound caused the decedent to aspirate and choke to death.

POST-OFFENSE ACTIVITIES BY PETITIONER

Ira Minifee waited in Carlton Swift's car while Swift and petitioner went into the bus terminal. Swift came out of the terminal first, with the petitioner immediately behind him. They were walking very fast and walked directly to the car. Swift got in the front seat on the passenger side while petitioner got in the back seat. Ira Minifee noticed a pistol in petitioner's hand and the petitioner said, "I shot me a motherfucker," Swift replied, "I don't think you hit him." According to Minifee, the petitioner wanted to turn on the radio to see if he could hear anything about the shooting.

Minifee drove Swift's car directly to Montgomery Village where Martha Mack, his girlfriend, was living. Regina Mack and Martha Mack, Regina's sister-in-law, were there. There was no further conversation until they arrived at Montgomery Village. When the petitioner walked into the apartment he again said, "I shot me a motherfucker." Swift asked if anyone wanted something to drink, and Swift, Minifee and petitioner went together to a liquor store on old Maryville Pike in Knoxville. They purchased some whiskey and wine. They then returned to Martha Mack's apartment.

Regina Mack was staying with Martha Mack at Martha's apartment on July 30, 1975. She was attempting to get a ride to the other side of town. Swift and the petitioner volunteered to give her a ride to the Walter P. Taylor homes. Swift asked Minifee if he wanted to go anywhere, and Minifee told him he wanted to go to the El Rocco Club, a night club on the corner of Vine Avenue and Central Avenue. Swift, Regina Mack, Minifee and petitioner left together in Swift's car. Swift was driving. When they reached the El Rocco Club, Minifee got out of the car. He turned around and saw a policeman running down the sidewalk. He also saw several police cruisers. Somebody

shouted, "Get off the corner, the man is looking for you." As a result, Swift drove off suddenly.

Detective Ray Perry of the Knoxville Police Department was a patrol officer on July 30, 1975. He noticed a white 1964 Chevrolet with a drive-out tag on the window in front of the El Rocco Club. Earlier that night, the dispatcher had given out a description of a car meeting the same description that was involved in a shooting. When he pulled up at the intersection, he glanced over and saw the car and then, as he turned through a parking lot, the car took off very fast.

He began to pursue and immediately called the dispatcher and told him he was in pursuit of a car. The white Chevrolet turned into a parking lot and circled the parking attendant's shed. Detective Perry went around the shed also and attempted to block the car. However, the other car started straight towards him, and he moved his cruiser to avoid being struck. He continued pursuing the white Chevrolet, which contained three people. During the chase, Carlton Swift, Regina Mack and the petitioner were the occupants in the white Chevrolet. Regina Mack testified that during the chase petitioner said he had killed someone. Over objection of defense counsel, she stated that Swift replied, "You have the nerve to rob a person, you have the nerve to kill somebody, but you don't have sense enough to wait on the money."

The chase lasted five to ten minutes and ended when the driver of the white Chevrolet, Carlton Swift, lost control of the car and wrecked in a field. One passenger ran from the car and disappeared. Detective Perry pulled the front of his car into the field and shone his lights across the field. His vision was poor because of the high weeds. He saw a black female run from the car and a black male. He fired a shot and struck Carlton Swift in the leg. Detective Perry did not see the third subject, Stacy, or where he went. The third suspect was not apprehended at the

scene nor could he be found in town. Captain Minor arrived at the scene after the accident had occurred. Carlton Swift and Regina Mack were apprehended and taken into custody.

Kathy Stacy, the defendant's sister, learned of the shooting when the petitioner came to her apartment on July 30, 1975. He "said something about a shooting at the Greyhound Bus Station." He stayed there between five and ten minutes and left. She stated that "[h]e was nervous, his eyes all glittery, and I couldn't talk to him because he wouldn't stand still."

Ira Minifee saw petitioner at Martha Mack's apartment approximately two hours after the wreck. Petitioner wanted to know if he could stay there for the night. Minifee told him that Swift had been caught earlier in the night. He had personal knowledge of that fact because he had been to the scene of the accident after the police arrived. Minifee told the petitioner that the police would be looking for him and that he was concerned about his children. Petitioner said "all right" and walked away.

Lloyd Robinson, administrative assistant for the extended treatment program at Central State Hospital, saw the petitioner during the first week of August at a night club in Nashville. He talked with the petitioner for approximately five minutes. He also saw petitioner the next day by the Hyatt Regency Hotel, in downtown Nashville. Mr. Robinson did not know that the petitioner was wanted for a crime in Knoxville when he saw him. Later, he was informed that the petitioner was apprehended in Nashville.

Petitioner was arrested in Nashville in early August. He was transported to the Knoxville City Jail where he remained until he was sent, eight months later, pursuant to court order, to Central State Hospital, F.S.D. in Nashville.

The petitioner was placed in a line-up conducted by Lt. Charles Long, Chief Jailer of the Knoxville Police Department

on September 2, 1975. Lt. Long testified at trial, over the objection of defense counsel, that prior to the line-up, the people who were to be in it were in the booking room, which also serves as the jail office. He overheard petitioner talking to Carlton Swift or one of the other men who were to participate in the line-up and say, "I'm guilty." Lt. Long stated he was not trying to eavesdrop nor was he questioning Mr. Stacy. The petitioner was in custody on an armed robbery charge, but the line-up concerned the shooting at the Greyhound Bus Terminal. Lt. Long was not sure what the petitioner was talking about.

THE TRIAL

Petitioner pleaded not guilty to the charges of murder, the first count of the indictment, and murder in the perpetration of an armed robbery, the second count of the indictment.

The State called Captain Shields Minor who testified regarding the investigation of the shooting at the Greyhound Bus Terminal, Knoxville, on July 30, 1975. Detective Ralph Moore told of the chase and apprehension of Carlton Swift and Regina Mack and the disappearance of a third suspect who was a passenger in the car with Swift and Mack.

Four persons who were at the Greyhound Bus Terminal on the day and hour of the shooting were called to testify. Miss Frankie Lee Mitchell, a passenger in transit, described the two young black men who were involved in the shooting, but she could not identify either of the two men. Lawrence Townsend, Alice Fitch, and Pedro Williams, all employees of Greyound, described the sound of the shooting, Mr. Ault's injuries, and the condition of the ticket counter immediately following the shooting. They did not witness the shooting and could not identify the participants.

Lt. Charles Long testified concerning pertitioner's arrest in Nashville and subsequent return to Knoxville. He recounted the

line-up which the petitioner was placed in and the statement of the petitioner which he overheard.

Ira Minifee, an indicted accessory, recounted the pre-offense events and post-offense activities of Carlton Swift, himself and the defendant, including petitioner's statements about the shooting. There was a question as to what kind of "deal," if any, was given Mr. Minifee in order for him to testify. Mr. Minifee, at the time, had charges pending against him. He stated that he was "not really concerned about it." Those charges, receiving and concealing stolen property, as a result of his testimony at trial, were to be retired.

Mr. Minifee had the opportunity to deal with the petitioner three or four days before the shooting and spent all of July 30, 1975, with him. He knew that petitioner had been a patient at Eastern State Psychiatric Hospital. Minifee felt that there was something wrong with petitioner. He observed that the petitioner acted nervous, that he would sit and twiddle his thumbs and look like he always had something on his mind. Also, he stated that petitioner would roll his eyes back into his head and look as if he was off in a daze. The petitioner would sit down and stand up again because he could not stay in one place.

Mr. Minifee also testified that the petitioner would laugh at inappropriate times when nothing had been said and that he had an uncontrollable laugh which was not in response to any type of joke. It was also very hard carrying on a conversation with petitioner. He stated that neither Swift nor he could communicate with the petitioner.

Mr. Minifee testified that petitioner did not take any medication during the three or four days prior to the shooting, although he was drinking a considerable amount of liquor given to him by Carlton Swift. It was Mr. Minifee's opinion, based upon his observations of the petitioner before and after the shooting, that petitioner was very disturbed.

Regina Mack testified as to her post-offense activities with the petitioner. There was a question of her use of the Fifth Amendment during her testimony. She was represented by counsel. Miss Mack, as was the court, was concerned about a possible "accessory to murder" charge which might be brought against her as the result of her testimony. She was questioned about the truthfulness of a statement which she had given the police, and, upon the court ordering her to answer, stated that the statement she gave was correct. She was subsequently questioned and testified to her involvement with petitioner, including the chase and statements made by petitioner.

July 30, 1975, was the first time she had any dealings with petitioner. She observed that he was "pretty fretful" and that he rolled his eyes back into his head. She thought that he was very strange because of the way he was acting.

After Regina Mack testified on recall, the State rested its case. Defendant's counsel then made a motion to dismiss the case. The court denied the motion as to the first count of the indictment charging the petitioner with murder, but sustained the motion to dismiss as to the second count of the indictment charging petitioner with murder in the commission of an armed robbery, ruling that there was no proof that there was a robbery.

The first witness called by petitioner was Mr. William Waters, Ira Minifee's attorney. Mr. Waters testified that Mr. Minifee was not correct when he had testified earlier that he had never been promised that he would not have to testify against Carlton Swift. Assistant District Attorney General Gill had advised him, in Mr. Minifee's presence, and, in fact, General Gill Spoke directly to Mr. Minifee and stated that it would not be necessary for Mr. Minifee to testify against Mr. Swift. Mr. Waters further testified that Mr. Minifee had a pending charge of receiving and concealing stolen property, but that an agreement was reached between him and Assistant District Attorney General Nichols.

As a condition of Mr. Waters recommending to his client that he testify, rather than take the Fifth Amendment, the charge would be nolle prossed. Mr. Waters also said that he was in the courtroom during Minifee's testimony and that it was the same testimony that he had told him since he had been representing him for the past two years.

Mr. John Gerdes, Director F.S.D., in Nashvile, next testified for petitioner. Mr. Gerdes is a licensed psychological examiner. After stating his qualifications he was held to be an expert in the particular field of psychology as a psychological examiner. Mr. Gerdes testified as to the petitioners three admissions to Central State Hospital. He had personal contact with the petitioner during his three admissions and had an opportunity to observe him during these admissions.

He stated that there are certain particular personality traits or actions of conduct on the petitioner's part that he observed that were consistent throughout his three admissions. Mr. Gerdes stated that petitioner behaved in a strange and bizarre manner. He seemed confused and disoriented and would go around with a silly smile on his face and at times would laugh for no apparent reason. He had a glassy sort of stare in his eyes and would report some strange things to the staff members of the ward. He characterized petitioner's overall behavior during his three admissions as fairly calm. However, during the first two months of each admission he was more agitated and would pace around the ward and walk up and down the halls frequently.

Mr. Gerdes attempted to test petitioner during his second admission in March of 1975 but was not completely successful. He atempted to give him a sentence completion test and a personality test, the Minnesota Multiphases Personality Test (MMPR). Mr. Gerdes testified that there are approximately 300 to 400 other psychological tests that could have been given to the petitioner. An electroencephalogram was given the petitioner which

was normal. No tests were made on the petitioner in 1976 because Mr. Gerdes felt that petitioner was too ill to be tested.

Mr. Gerdes testified that he had formed an opinion as to the petitioner's mental condition. He believed that the petitioner was mentally ill, suffering from schizophrenia. He considered petitioner to be mentally ill in June of 1975 because he considered him a chronic type mental patient. Though his condition may be in remission at some times and he may not appear to be outwardly psychotic, he is always basically mentally ill. Mr. Gerdes felt that when the petitioner returned to the F.S.D. on March 9, 1976, he was having one of his chronic episodes and was mentally ill at that time. He also stated, on cross-examination, that he did not testify as to the petitioner's mental condition on July 30, 1975, because he was not asked. He also stated that in his opinion it is not true that a simple schizophrenic would have the capacity to appreciate the wrongfulness of his conduct because there are some simple schizophrenics that could appreciate the wrongfulness of their conduct, while there are others who could not.

Mr. Gerdes, as Director of F.S.D., is in charge or has control of the records that are kept in the ordinary course of business. They include nursing notes, diagnosis of the staffing of the patients, and the doctor's notes. Mr. Gerdes testified that he is familiar with how the nursing observation notes are prepared. There are approximately four psychiatric technicians on each ward where a patient is kept. On each shift they record a brief note on the patient's chart when something important happens. Mr. Gerdes referred to the following specific nursing notes:

> The patient appears to have regressed back to where he was when he was here before. He walks the halls and laughs and talks to himself again. He said, "I saw a black ghost with no shoes on, with several heads, with a horn coming out of its nose. He was dressed in white pants. He didn't

have no matches, he had to light his cigarette off mine." Patient is in transition; he was trying to deal with his feelings but now he is regressing in order to escape reality. (March 21, 1976)

. . . .

Mr. Stacy seems rather confused; he does not know how long he has been here; has dreamy expression on his face. Mr. Stacy has also been smoking his cigarettes down to small butts and then he swallows it after extinguishing the fire in his mouth. When asked why, he stated that it gives him something to do and that it doesn't hurt. (March 26, 1976)

. . . .

Patient spent most of the shift yesterday walking the hallway and laughing inappropriately. (March 31, 1975)

Upon cross-examination, over the objection of defense counsel, Mr. Gerdes read the following notes also:

Patient talked with his relatives on that shift. He worked in the kitchen. Patient is well groomed, he is responsive to instructions and ward routine. (July 11, 1976).

. . . .

Stacy is still one of my best patients. He is among the quietest patients on the ward. (July 13, 1976)

. . . .

I was talking to this patient and patient said he would like to go back to Eastern State Hospital. Patient also said he knew that what he'd done was wrong. He's working in the kitchen and going real good and he causes no problems in the ward and gets along with the other patients. (August 19, 1976)

Mr. Gerdes concluded his testimony by stating that the fact that during periods of time during the third admission that the petitioner got along well on the ward is consistent with his own observations and that he believes the petitioner was medicated during that period of time. From the dates on the foregoing observations, the petitioner would appear to be more acutely ill during the first several months of the admission. However, he would be placed on medication, and that fact, coupled with the fact that the hospital is a comparatively safe, secure, low stress environment, would explain the patient's improved condition, according to the witness. The petitioner would not be medicated when he was returned to F.S.D. It would take about a month or six weeks for his behavior to come under control. Mr. Gerdes stated that the petitioner would be a good patient after control was achieved.

The next witness called by the petitioner was Dr. Frank L. Luton, the Assistant Superintendent for Clinical Psychiatric Services at the Middle Tennessee Mental Health Institute in Nashville. Dr. Luton is a licensed physician. The court found Dr. Luton to be qualified as an expert in the field of psychiatry.

Dr. Luton examined the petitioner while he was at the Forensic Services Unit at Middle Tennessee a number of times in 1976 and 1977. He also observed him in the dining room and interviewed him in the staff meetings at which he presided. He stated that the petitioner had hallucinations, heard voices and saw things that were not there. Dr. Luton considered petitioner to be schizophrenic at all times and when not medicated to be "grossly psychotic, grossly ill, mentally ill."

Dr. Luton did not perform any formal testing on the petitioner although formal testing is used for diagnostic purposes. He did not feel that it was necessarily important to perform psychological testing on petitioner. He stated that "[i]t doesn't take a psychological test to tell that this man [Stacy] was a schizophrenic, that he was seriously mentally ill."

Dr. Luton had formed an opinion concerning the petitioner's mental condition. He found him to be mentally ill, suffering from schizophrenia, chronic and undifferentiated type. In April of 1976, he considered petitioner to be acutely psychotic.

Dr. Luton testified that petitioner told him on September 3, 1976, that he had been off his medication for about two weeks at the time of the shooting and that he begins to hallucinate when not on medication. That the petitioner was not on medication during the eight-day period between his release from Eastern State on July 23, and the shooting is consistent with Dr. Luton's understanding of the petitioner. Dr. Luton stated that petitioner could not be trusted to take his medication outside of an institution because he gets the idea that he does not need it anymore. Thus, it was Dr. Luton's opinion that when the petitioner was allowed to leave a mental institution, he would become grossly psychotic, grossly ill because of the lack of medication. Although petitioner is not a danger to himself or others when he is medicated, he is dangerous when off his medication. Dr. Luton stated, "the minute that he, [a chronic schizophrenic], ceases taking his medication, he's losing ground." Therefore, if petitioner had been off of medication for two weeks prior to the shooting the chances are that he would have been seriously mentally sick at that time and not able to judge the consequences of his acts.

Dr. Luton was asked a series of questions regarding the application of the test set forth in *Graham* v. *State*, 547 S.W.2d 531 (1977). It was Dr. Luton's testimony that in his medical opinion, William Earl Stacy did not understand the wrongfulness of his act on July 30, 1975, the date of the murder. He was further of the opinion that petitioner could not conform his conduct to the requirements of the law on July 30, 1975.

Dr. Aaron Means, Administrator and Coordinator for Pupil Personnel for Knoxville City Schools, testified next. He is custo-

dian of the student records for the Knoxville City Schools and had a copy of the petitioner's school records.

Dr. Means testified that the petitioner was in the first grade in 1958—1959 and in 1959—1960. He eventually completed the ninth grade in school. Petitioner made all "F's" in the tenth grade in 1969. While in the sixth grade the petitioner was given a reading test. Mr. Stacy scored a 3.8 which registered in the lowest tenth percentile. He was also given a spelling test in which he registered in the fifty-sixth percentile.

Pursuant to a stipulation between the State and the defense, the testimony of Ms. Becky Smith and Mr. J. B. Jackson was admitted. Mr. Jackson was also briefly examined. Ms. Becky Smith is a social worker and during the petitioner's three admissions to F.S.D., worked with him in that capacity. Her testimony corroborated Mr. Gerdes that during the first several months of the petitioner's three admissions she observed him exhibit a kind of inappropriate laughter and giggling. He paced the halls in an excessive manner, and his emotions and his affect were wrong.

Mr. J. B. Jackson, presently a social worker at the Drug and Alcohol Unit at F.S.D., was an aid at F.S.D. during the petitioner's second and third admissions. He observed the petitioner during those two admissions, and, at least during the first several months of those admissions, petitioner exhibited inappropriate laughter, told bizarre stories, and, in his opinion, was hallucinating. He was keeping the other patients awake with his laughter one night, and when asked what was going on, petitioner told Mr. Jackson that he saw a ghost. Mr. Jackson felt that the petitioner was mentally ill during his second and third admissions.

Mr. Jackson also testified that within three days of his third admission the petitioner was playing basketball and seemed to

be in good spirits on March 21, 1976. The petitioner also worked in the kitchen later and was a good worker.

The next defense witness called was Mr. Kim Tollison, Assistant District Attorney General for Knox County, Tennessee. Prior to his assuming that position, Mr. Tollison was a staff attorney with the U.T. Legal Clinic, and while in that capacity, represented the petitioner both before and after the shooting.

On July 8, 1975, the petitioner had a commitment hearing in Knox County Criminal Court, Division II. Petitioner had pending criminal charges at that time which occurred between October 1974 and July 8, 1975. He was represented by Mr. Tollison. Prior to that commitment hearing on July 8, 1975, Mr. Tollison tried to converse with the petitioner regarding those burglary charges. Mr. Tollison found it impossible to communicate with Mr. Stacy. Petitioner would be asked questions but would not respond. He would only sit and stare blankly. Mr. Tollison also represented the petitioner after July 8, 1975, concerning the murder charges in this case. Mr. Tollison attempted to talk with the petitioner subsequent to the date of the murder, July 30, 1975, but the petitioner would ramble along about something that did not appear to have any connection with the question asked. Petitioner did not make any sense to him. He sat and stared straight ahead.

Mr. Tollison stated that as a result of his conversations with the petitioner prior to July 8, 1975, it was his opinion that petitioner was mentally ill. He further stated that based on his conversations with the petitioner in August and September 1975, that the petitioner was mentally ill during those months.

As stated earlier, Mr. Tollison represented the petitioner at a court hearing in Division II, Knox County Criminal Court on July 8, 1975, the Honorable Richard Ford presiding. The petitioner had pending burglary, larceny and shoplifting charges at

that time. The purpose of that hearing was to determine whether the petitioner was competent to stand trial or whether he should be committed to an institution. The court found the petitioner incompetent, dangerous to himself and others, and committed him to the Commissioner of the Department of Mental Health for an indefinite period. Mr. Tollison was never notified by Eastern State Psychiatric Hospital that the petitioner was to be, or was, released on July 23, 1975, just prior to the murder.

The next witness called was Judge Richard Ray Ford. He was found to be an expert in the field of mental health law, as applied in the criminal courts of Tennessee.

Judge Ford presided over the July 8, 1975 competency and commitment hearing regarding the petitioner. Petitioner was charged with burglary, larceny, receiving and concealing stolen property and shoplifting at that time. Dr. Cyrus Higgs, of the Tennessee Department of Mental Health, testified at that hearing. The court found the petitioner incompetent to stand trial and because of his mental illness, to possess a likelihood to cause serious harm to himself or others, and to be in need of care and treatment in a mental hospital. However, petitioner was determined not to be in need of a maximum security facility at that time because his condition was such that if he continued with his medication and treatment he would be manageable at Eastern State. The petitioner was sent to Eastern State for an indefinite period. Judge Ford was never notified by Eastern State that petitioner was discharged.

Judge Ford subsequently learned that the petitioner had been illegally discharged from Eastern state and was in custody, suspected of murder. On February 17, 1976, Judge Ford recommitted the petitioner. His reasoning was that "obviously the Court's and other parties' concern about his being dangerous to himself and others has been borne out by what has happened."

Judge Ford also stated that based upon his own observations of the petitioner and the information available on July 8, 1975, that he considered petitioner to be seriously mentally ill on July 8, 1975, approximately three weeks before the murder.

The defense next called Linda Chapman, presently a counselor at Child and Family Services in Knoxville. During the summer of 1975, she was employed by Eastern State Hospital as a social worker and was part of a treatment team which worked with the petitioner. She prepared the discharge papers for the petitioner. She stated that petitioner was discharged on July 23, 1975, without medication or a prescription and that no aftercare appointment was made at a mental health center although such an appointment was normal practice at that time. The State attempted to have Linda Chapman testify as to the contents of discharge summaries, however, the trial judge sustained the defense objections and the discharge summaries were marked as Exhibits 8 and 9 for *identification only*. The discharge summary was later discussed at length by the Court of Criminal Appeals even though the summary was never put in evidence.

The petitioner's next presentation of proof consisted of the reading of the testimony of Dr. Cyrus Higgs, a psychiatrist at Western State Psychiatric Hospital. The parties stipulated that, if Dr. Higgs were called, his testimony would be as it had been on July 8, 1975, and that testimony was read to the jury. That testimony is as follows: Dr. Higgs was a witness at the July 8, 1975 commitment hearing before Judge Ford. He was found to be an expert witness in the field of medical psychiatry.

Dr. Higgs observed and tested the petitioner when he was first admitted to F.S.D. on March 5, 1975. He also had the benefit of the reports from the doctors at Helen Ross McNabb Center in Knoxville, who had seen the petitioner before he was sent to Nashville. Dr. Higgs was also a member of petitioner's April 1, 1975, staffing team. The team felt that the petitioner was not

competent to stand trial at that time and that an insanity defense could probably be supported.

Dr. Higgs testified at the July 8, 1975 hearing that the petitioner was on medication during the time he was at Central State (March 5, 1975—July 1, 1975) and that a prescription was issued for him to take with him when he left. He was still on that medication on July 8, 1975. Dr. Higgs felt that without his medication, there would exist a possibility that petitioner could have a relapse, particularly if he was back in the same sort of stresses, situations, or environments in which he developed the illness in the first place. Dr. Higgs concluded by affirming "that without the controlled discipline . . . and the giving of his medication, he [Mr. Stacy] would probably have a relapse, and that this relapse could cause serious harm to himself."

Interestingly, during the cross-examination of Dr. Higgs by an Assistant District Attorney General, Dr. Higgs stated that William Stacy was insane under the M'Naghten Rule. This related to December 1974, but is obviously relevant in determining insanity on July 30, 1975. There was finally a question as to whether there would be a danger of serious harm to others if the petitioner stopped taking medication and had a relapse. Dr. Higgs said that there was a danger of serious harm to himself and to others.

Mr. Lloyd Robinson, an administrative assistant for the extended treatment program at Central State Hospital, was the next defense witness. In the summer of 1975, he was employed at the Forensic Services Division as an administrative assistant. He was in charge of the work program there. He was acquainted with the petitioner in that capacity since Mr. Stacy worked for him while medicated. Petitioner was a good employee and did not cause any trouble. Mr. Robinson was aware that the petitioner had been sent to Eastern State Hospital in July 1975.

By happenstance, he saw the petitioner during the first week of August 1975 at a night club in Nashville. This was following the murder, but prior to the petitioner's arrest. He attempted to talk to petitioner, but the conversation was basically unintelligent, although the petitioner did ask about some of the employees and patients at Central State. Mr. Robinson stated, "It was a kind of unintelligent conversation. He heard me but I don't believe he really did." Petitioner seemed to be very nervous. His voice was trembling, and he had a strange smile on his face when he grinned.

Mr. Robinson also saw the petitioner the next day standing with a group of people by the Hyatt Regency Hotel in downtown Nashville. He observed the petitioner though the petitioner could not see him. He appeared nervous and his left hand was shaking.

Upon cross-examination Mr. Robinson conceded that it would not be unusual for a person to be nervous who was being sought by the police.

Based on his observations and conversations with petitioner, Mr. Robinson formed the opinion that the petitioner was mentally ill as of the first week of August 1975. He also did not think that the petitioner was medicated when he saw him, although he did not know for sure.

The defense next called Reginald Leverette. Mr. Leverette was in jail with the petitioner from September 2, 1975, until February 1976. He had not seen the petitioner, except in passing in the county jail the day before he testified, since February 1976.

Mr. Leverette stated that he attempted to converse with the petitioner during the fall of 1975 when they were in jail, but it was impossible. He would start talking about one topic, but the

petitioner would talk about something completely different. Also, the petitioner thought he was a member of the President's Cabinet. ' If I asked him something, he would tell me he had to go talk with the President, or something." Mr. Leverette observed the petitioner walking the floor "all the time," naked, with toilet paper sticking out of his nose. He also observed the petitioner wake out of his sleep laughing. Petitioner was also very nervous.

Mr. Leverette formed an opinion as to the petitioner's mental condition during the fall and winter of 1975. He stated that the petitioner "ain't got good sense, he's crazy." Petitioner was not on medication when Mr. Leverette was in jail with him.

Ruby Patterson was the next witness for the defense. She and Kathy Stacy, petitioner's sister, visited the petitioner during July 1975 when he was at Eastern State Hospital. She was unable to carry on a conversation with him because he laughed all the time and could not sit still. Petitioner was constantly "up and down." She observed that his mouth quivered all the time, that his hands shook, that his eyes were not clear, and that the petitioner smoked a lot.

As a result of her attempted conversations with the petitioner and her observations of him in July 1975, Ms. Patterson formed an opinion as to the petitioner's mental condition. She said, "[T]o me he just didn't seem right." He didn't seem like people that she was around all day.

The defense's next witness was Kathy Stacy, petitioner's sister. She testified that after the petitioner left Eastern State, after his first visit in October 1974, he lived with her and her family. He was very nervous. The petitioner did not sleep well because he saw ghosts at night. He told his sister that things were in the house which were not there. The petitioner had a habit of turning the gas stove on at night and leaving it on. He burned pots on the stove.

In July 1975, Kathy Stacy visited the petitioner almost every day when he was at Eastern State Hospital on his second admission. She stated that "[h]e still had problems." He would giggle and laugh and she could not carry on a conversation with him. The conversations were unintelligible. On one particular day she took someone with her to visit petitioner. Petitioner ran and hid from her behind a bed. He acted like a child. He was also very nervous and walked constantly. She considered him to be mentally sick.

When the petitioner was discharged from Eastern State on July 23, 1975, she picked him up. He did not have any medication with him, nor did he have an appointment at a local mental health center. She stated that when she got home after picking the petitioner up she called Eastern State to find out if he, in fact, had been discharged. She felt, because of his conduct, that he had escaped. She could not believe that the petitioner had been discharged.

Petitioner lived with his sister after he was discharged on July 23, 1975. Kathy Stacy testified that he "acted strange." She could not talk to him because of his giggling. He would walk into her bedroom at night and tell her that he was seeing ghosts. On one occasion the petitioner turned all the lights on in the house to show his sister the ghosts in the house. Petitioner broke dishes around the house and complained of people touching him when he slept. One day the petitioner put an unloaded pistol to her son's head and told his nephew that he would "blow his brains out." She stated that, based on her observations of the petitioner while he lived with her during July 1975, he was "sick" and "had a problem."

Kathy Stacy visited the petitioner when he was in jail after the shooting. She testified that his condition was the same and that he was still giggling and laughing.

The last witness called by the petitioner was Adolph Siegmann, a licensed psychiatrist who was presently employed at the Veterans Administration Hospital in Murfreesboro, Tennessee. He was previously employed as a psychiatrist at Central State Hospital, F.S.D., for 14 years. After stating his qualifications, the court found Dr. Siegmann to be an expert witness in the field of psychiatry.

Dr. Siegmann was acquainted with the petitioner during his three admissions to F.S.D. He had numerous occasions to observe and converse with the petitioner. When the petitioner first came to F.S.D. in 1974, he was sent from prison. He was about to be released from the penitentiary but was in such an emotional state of mind that he could not be integrated back into society. He was rather flatly relating, a somehow pleasant but inappropriately organized person. Whenever he talked about serious matters he giggled in completely inappropriate ways. Petitioner was hallucinating. When the petitioner next came back to F.S.D. in March 1975, he was "sullen, calm, composed to the point of indifference." His effect was flat and inappropriate. He laughed in a silly way. Dr. Siegmann also saw the petitioner when he first returned to F.S.D. on his third admission in March 1976. At first he demonstrated no overtly psychotic symptoms. However, fairly early after his arrival in March of 1976, the petitioner's behavior disintegrated, and he appeared disoriented.

Dr. Siegmann stated that as a result of hi observations of the petitioner he was of the opinion that the petitioner was suffering from schizophrenia. Dr. Siegmann continued and stated that "[schizophrenia] is like a camilian [sic], often changing its whole kind of character, depending on the kind of stresses, the timing of stresses, the timing of support, and similar outward circumstances." As a result, petitioner was subject to periods of relative calm and appropriate behavior. There are also periods

when the illness manifests itself and more or less takes over. Dr. Siegmann testified that when the petitioner was not under enough medication, or there were special stresses, then the illness manifested itself, and he was overtly psychotic. If the petitioner was not medicated during the trial he would be very restless, fidgety, inappropriately giggling, to the point that to close observers he would be embarrassed or annoyed by his behavior in court. Further, if he had been off his medication for a longer period he would interrupt the court proceedings with angry outbursts.

Regarding the shooting on July 30, 1975, and referring to the *Graham* test, Dr. Siegmann testified that, based on his observation of the petitioner, his diagnosis of the petitioner's mental illness and his past knowledge of the petitioner he was of the opinion that petitioner could not conform his conduct to the requirements of the law at the time of the shooting. Dr. Siegmann conceded that without being present or observing the situation in which the patient is acting, it is not possible for a psychiatrist or any other person to know whether a schizophrenic is in a period where he has a reasonable amount of control over his conduct or if he is in a period where the disease has reasserted itself. But, he stated that, based on his knowledge of the petitioner, if it were brought to his attention that on a given day the petitioner had been extremely nervious, could not stand still, had been laughing and giggling inappropriately, that would indicate to him that the petitioner's state of schizophrenia was not in remission and that he was disintegrating.

In referring again to the *Graham* test, while Dr. Siegmann did not feel that the petitioner could conform his conduct to the requirements of the law, he did believe that petitioner could "vaguely" appreciate the wrongfulness of his act. It was Dr. Siegmann's opinion that the petitioner understood himself to be in a situation which was "legally endangering to him."

Dr. Siegmann also testified as to the effect of medication on the petitioner. During the first several months of his second admission, petitioner was psychotic and on April 1, 1975, a staff meeting conclusion was that the petitioner was "not competent, judicially commitable but not in need of maximum security." Prior to July 1, 1975, the petitioner's condition had symptomatically improved. Medication played a decisive role in that improvement because without drugs the petitioner would disintegrate even in the community of the hospital.

Dr. Siegmann stated that in the petitioner's discharge summary it was indicated that it was very important that his medication be maintained. Petitioner's condition could deteriorate if medication was not continued. During the last several years, when the petitioner was not taking his medication, he became psychotic. Further, Dr. Siegmann testified that when the petitioner was not under a supervised environment he would not take his medication because he did not understand the significance of it and because he did not want the psychiatrists to exercise power over him.

The defense rested at the end of Dr. Siegmann's testimony.

In rebuttal the State called Dr. Frank Beasley, a licensed psychiatrist from Eastern State Hospital. He was found to be a competent expert and qualified in the field of psychiatry.

The Assistant District Attorney posited a hypothetical question to Dr. Beasley. Dr. Beasley was asked to assume that two men went into the Greyhound Bus Terminal and attempted to rob someone working there and that someone was killed during the attempted robbery; that the two men fled the scene of the shooting and that one said he shot someone; that later a chase involving suspects of the shooting and the police ensued in which, after the automobile being chased was involved in an accident, one of the suspects disappeared and was eventually ar-

rested in Nashville. Dr. Beasley was also asked to assume some facts regarding the behavior of the person with the gun. Pursuant to the hypothetical question, Dr. Beasley stated that the hypothetical person did realize what he was doing at the time of the shooting. The shooting sounded planned, organized, and when it did not work out, he realized the consequences and fled.

A hypothetical question was attempted to be asked concerning the second prong of the *Graham* test—whether or not the hypothetical person could conform his conduct to the requirements of the law. However, the court did not allow an answer to the question based upon his own personal observations and dealings with petitioner.

Dr. Beasley concluded his testimony by stating that as a psychiatrist he would, in attempting to make a diagnosis of a person at a particular time when a crime is committed, ask him the circumstances surrounding the alleged crime.

Neither the State nor the petitioner called additional witnesses.

This long review of the facts was deemed necessary not only because of the reviewing standards of *Jackson* v. *Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), but also because of the troubling nature of this, and all, heinous crimes where the plea is not guilty by reason of insanity. Relatively great strides have been taken in the law as it relates to the mentally ill. Although no universally satisfactory test of legal sanity has been devised, nevertheless, the criminal law does not attach penalties for acts for which the perpetrator was not responsible. But this is really the beginning of the inquiry rather than the end. The Legislature has thus far failed to devise constitutional programs for dealing with those persons who are incompetent to stand trial or who are acquitted as not guilty by reason of insanity. In the Acts of 1974, the lawmakers included in the statutes

T.C.A. § 33-709 which merely provides that persons acquitted by reason of insanity may be subject to hospitalization subject to §§ 33-603 or 33-604 of the Code. However, the provision is discretionary with the district attorney general who may or may not seek custodial care for the acquitted defendant. The provision has been characterized as "cumbersome and awkward" as well as "inadequate." *Edwards* v. *State,* 540 S.W.2d 641, 657 n. 6 (Tenn.1976)(Henry, J., dissenting), *cert. denied,* 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777 (1977).

[1] Even if commitment is sought and received, the Supreme Court requires that criminal committees be afforded the same due process rights as civil committees including a precommitment hearing and periodic examinations at reasonable intervals. As soon as his condition warrants, he must be released. *See generally, Jackson* v. *Indiana,* 406 U.S. 715, 95 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey* v. *Cady,* 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed. 2d 394 (1972); *Baxstrom* v. *Herold,* 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

The court is not unmindful of the potential for harm which may result if the habeas corpus petition is meritorious. All too often a person dangerous to himself and others may return to the streets after a brief stay in a mental institution. Obviously this has already happened to the petitioner, Stacy, once before resulting in a tragic murder. A highly problematical area is the use of drugs in treating the kinds of illnesses which afflict Stacy. They tend to create what the wags refer to as "synthetic sanity" or "chemical competency" which can rapidly wane in the use of the medication is discontinued. This, too, happened to Stacy.

Stacy was suffering from "schizophrenia, chronic, undifferentiated type." *Stacy* v. *Tennessee,* 556 S.W.2d 552, 553 (Tenn.Crim.App.1977). At the time of his competency hearing, he was being treated with Haldol, a tranquilizing, anti-psychotic medication which helps " 'people to experience less distress,

anxiety or panic, or depression, which, therefore, helps them to stay more composed, more aware of the world and thereby able to function more appropriately to their own benefit.' " *Id.*

Although the trial court found Stacy incompetent to stand trial, this determination was overturned at the appellate level. The Court of Criminal Appeals in the preceding case ruled that as long as Stacy was medicated he was competent to face trial. The court noted that in the absence of such medication the likelihood was that Stacy would never be competent. *Id.* at 559.

In addition to the foregoing, the court is further hampered in its remedial possibilities in that it cannot order a new trial for the petitioner in the event that his petition is granted. In a case originating in this court, Gray, C.J., the Sixth Circuit Court of Appeals overturned a bank robbery conviction, ruling that the government had not proved sanity beyond a reasonable doubt and remanded the case to the district court to determine whether a directed verdict of acquittal should be entered or a new trial ordered. *United States* v. *Burks,* 547 F.2d 968 (6th Cir. 1976).

On certiorari, the Supreme Court reversed and remanded. It was the unanimous determination of that Court that the double jeopardy clause of the fifth amendment barred a second trial where there was insufficient evidence to sustain the verdict of the jury. *Burks* v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). A granting of Stacy's petition would likewise prevent retrial.

The foregoing is mentioned in order to underscore the great seriousness with which this matter has been reviewed. This is not the form of appellate review which permits the correcting of an error. Rather, it is all or nothing: the state either made its conviction or it made a mistake. If the latter was the case, it cannot be undone.

The court turns first to the petitioner's claim that his sanity was not proved beyond a reasonable doubt. In *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2787, 61 L.Ed.2d 560 (1979), the Supreme Court held that in federal habeas corpus proceedings involving the sufficiency of the evidence, the relevant question is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." 443 U.S. at 319; 61 L.Ed.2d at 573.

[2,3] The law of Tennessee, of course, is determinative of the issue of sanity in this matter. *Moore* v. *Duckworth*, 443 U.S. 713, 714, 99 S.Ct. 3088, 3089, 61 L.Ed.2d 865, 868 (1979). In Tennessee, it is well established that once the evidence adduced by either the defense or the prosecution raises a reasonable doubt as to the sanity of the defendant, the burden then shifts to the state to prove the defendant's sanity beyond a reasonable doubt as an essential element of the crime. *See, e.g., Collins* v. *State*, 506 S.W.2d 179 (Tenn.Crim.App.1973).

The benchmark decision on the law of insanity in Tennessee is *Graham* v. *State*, 547 S.W.2d 531 (Tenn.1977). Therein, it was expressly held that the rules set down in *Graham* would apply to all criminal trials begun on or after the date of the release of that opinion; hence, it applies here. *Id.* at 544.

Graham adopted the Model Penal Code formulation of insanity drafted as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Tennessee adopted a version of the above which substituted the word "wrongfulness" for "criminality." 547 S.W.2d at 543.

The Tennessee Supreme Court further approved a set of questions for the jury which succinctly state the law as adopted and focus inquiry on the relevant issues. These questions were formulated by Judge Harry Phillips in *United States* v. *Smith*, 404 F.2d 720 (6th Cir. 1968). They are as follows:

(1) Was he suffering from a mental illness at the time of the commission of the crime?

(2) Was that illness such as to prevent his knowing the wrongfulness of his act?

(3) Was the mental illness such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating?

Id. at 727.

It is further explained that a "negative finding as to the first question or negative findings as to both the second and the third questions would require rejection of the insanity defense. An affirmative finding as to the first question, plus an affirmative finding as to either the second or third question, would require a jury verdict of 'not guilty' because of the defendant's lack of criminal responsiblity." *Id.* Both the questions and the explanation thereof were approved by the Tennessee Supreme Court in *Graham*, 547 S.W.2d at 543.

[4] The questions referred to above were not presented to the jury in the instant case, but that is by no means a fatal defect

where the court accurately stated the law to the jury as delineated in *Graham*. This court finds that the jury was properly instructed.

[5,6] The crux of the problem which faces this court is the third question, *supra*. There is no question that the defendant presented a compelling case of mental derangement at trial. Accordingly, the burden was shifted to the state to prove, beyond a reasonable doubt, that the defendant was sane at the time the crime was committed. This is not a light burden and mere conjecture is not sufficient. There must be evidence in the record which, if believed by a jury, would form the basis for the conclusion that the defendant Stacy could conform his conduct to the dictates of the law on July 30, 1975. The third question is of central focus here because there was conflicting evidence as to whether the defendant could comprehend the wrongfulness of his acts. It is the conclusion of this court that the jury was fully justified in finding that William Earl Stacy, at the time of the murder, could distinguish right from wrong beyond a reasonable doubt. This is evidenced by the defendant's conduct as well as witnesses, including experts, for the defendant.

With the only issue here being whether the defendant could conform his conduct to the requirements of the law at the time of the killing, the testimony of the witnesses is hereinafter summarized. Indeed, the summary in Justice Henry's dissent cannot be improved upon, and the same will be adopted here.

I.

Mental Health Background

Defendant's background of hospitalization is significant. He was first admitted to the Forensic Services Division at Central State Hospital on August 13, 1974, from the state penitentiary, where he was serving a sentence for burglary

and shoplifting. On October 18, 1974, he was transferred to Eastern State Hospital, from which he was discharged on October 23, 1974. On March 5, 1975, he was again admitted to Central State Hospital from the Criminal Court at Knoxville. On July 8, 1975, an incompetency and commitment hearing was conducted before the Honorable Richard R. Ford, Circuit Judge, and, as a result, on July 10, 1975, he was admitted to Eastern State Hospital for an indefinite period.

Judge Ford testified in this case as a witness for the defense. It was his testimony that based upon his personal observation on July 8, 1975, and on the information available, the defendant was seriously mentally ill. This was twenty-two days before the murder.[2]

On July 23, 1975, seven days before the murder, defendant was discharged from Eastern State Hospital without medication and without any provision for follow-up care.

II.

Lay Testimony

Defendant's sister, Kathy Stacy, testified that upon discharge defendant was so badly deteriorated that she thought he had escaped and called the hospital to confirm the fact of his discharge. She describes his conduct during the week between the discharge and murder as featuring giggling, laughing inappropriately, nervousness, shaking, staring, and having hallucinations of ghosts. On one occasion he turned out the lights so she could see the ghosts. He

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[2] Judge Ford also testified that he was not even notified of the release of this prisoner whom he had committed.

randomly broke dishes, walked naked about the house in front of his sister, her children and guests, and put an unloaded pistol against the head of her son and told him he would "blow his brains out." *On the day of the crime* he returned to her house with his "eyes all glittery," laughing, giggling and unable to stand still.

The testimony of Ira Minifee, an indicted accessory, and Regina Mack, both witnesses for the State, fully supports defendant's plea of insanity. Their descriptive testimony related to the *very day of the murder* and fully supports the testimony of Kathy Stacy. Further, it is consistent with and corroborative of the observations of the medical experts. In the very teeth of the crucial and undisputed testimony of these three witnesses, and with no evidentiary support in the record, the Majority asserts that "his conduct on or about the time of the murder does not compare even remotely with the conduct described when he was totally psychotic or out of touch with reality."

Reginald Leverette, a fellow prisoner for about four months following the murder, told of defendant's various acts of bizarre conduct, including a fixation that he was a member of the President's Cabinet, waking from his sleep laughing, and walking about his cell naked with toilet paper sticking out his nose. His testimony states the defendant's condition in terms of thundering eloquence. He says defendant "ain't got good sense, he's crazy."

Stripped of all technical terminology this is precisely what the medical experts say. While this case is, in no sense, wholly dependent upon psychiatric testimony, the testimony of the medical witnesses gave thundering support to the defendant's plea of insanity.

III.

Medical Testimony

John T. Gerdes, Director of the Forensic Services Division at the Middle Tennessee Mental Health Institute,[3] a graduate psychologist with work completed on his doctorate at Vanderbilt, had personally observed and evaluated defendant on each of his three admissions. He confirms the lay witnesses on the glassy stare, the inappropriate laughter, the silly smile and other bizarre conduct.

He described the defendant thusly:

> I considered him to be a *chronic* type mental patient who has periods when his condition is in remission such that he doesn't appear as such outwardly psychotic but he's *always mentally ill.* (Emphasis supplied).

The defendant called Dr. Frank L. Luton, the Assistant Superintendent for Clinical Psychiatric Services at the Middle Tennessee Health Institute. Dr. Luton has practiced psychiatry for forty-eight years. His career has been remarkable. His background includes graduation from the Medical School at Vanderbilt, four years of post-graduate training at Johns Hopkins, training in London, further training in Boston and as a teacher of psychiatry at Vanderbilt. He has been professor emeritus at Vanderbilt since 1963. We consider his testimony to be significant and conclusive.

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[3] The present name of Central State Hospital, a designation sometimes used in this opinion to conform to trial usage.

Dr. Luton was thoroughly familiar with all records pertaining to defendant and had interviewed and evaluated him on numerous occasions. He diagnosed his condition as "schizophrenic, *chronic* undifferentiated type." The word "chronic" is defined in *Dorland's Medical Dictionary*, 25th Edition (1974) as "persisting over a long period of time." Thus, definitionally, no valid comparison may be made with a "cyclic, periodic or episodic" disorder such as we dealt with in *Forbes* v. *State*, 559 S.W.2d 318 (Tenn.1977).

Dr. Luton's testimony sheds substantial light on the medication question. He testified that "[w]hen he's not medicated, he becomes grossly psychotic, grossly ill, mentally ill." He testified that with medication defendant "behaves in a relatively normal fashion," but that he cannot be trusted to take his medication—"[h]e gets the idea that he doesn't need it any longer."

Basing his testimony on his own examinations he voiced the opinion that at the time of the murder defendant "was mentally sick, seriously, at that time." He testified that his condition was "chronic" and that it "goes back to the time when he committed the act and [that] at that time he was *not able to judge the nature of his act.*" (Emphasis supplied). Further, he was "not able to conform" his conduct to the requirements of the law. It is evident from Dr. Luton's testimony that defendant is dangerously psychotic when off his medication and yet he was released from the East Tennessee Mental Health Institute (Eastern State Hospital) without medication. As Dr. Luton phrased it, "the minute he quits taking his medicine, he's losing ground."

The testimony of Dr. Cyrus H. Higgs, Jr., at the July 8, 1975, hearing before Judge Ford appears in the record by

agreement. Dr. Higgs was, at the time, Assistant Superintendent for Forensic Services at Central State Psychiatric Hospital. He had observed and evaluated defendant while at Central State. He testified to *chronic* schizophrenia and to the danger of a "relapse" without medication. Based on defendant's condition in December 1974 and assuming its continuance, Dr. Higgs felt that *"even under the McNaughten Rule that he would have an insanity defense."*

Petitioner's last witness was Adolph Siegmann, formerly a psychiatrist at Central State Hospital, now at the Veteran's Administration Hospital in Murfreesboro. His testimony was based upon observations from April to August 1974, from March until July 1, 1975, and March 1976 to March 1977—all at Central State.

He testified unequivocably that defendant is mentally ill. He spoke of his "giggling in completely inappropriate ways," a condition defendant demonstrated to his sister and other lay witnesses from the date of discharge to the day of the murder. He said that this was "truly a sign of mental disease." He spoke of the smiles, the hallucinations and inappropriate behavior, also observed by the sister and other lay witnesses on the very day of the murder and during the preceding week.

According to Dr. Siegmann there had been symptomatic improvement in defendant's condition by July 1, 1975, when he was transferred to Eastern State, as a result of the "decisive" role played by medication. But "it was very important that his medication be maintained as Mr. Stacy's condition is apt to deteriorate if this is not done." If he were released without medication he "would disintegrate relatively soon again."

Dr. Siegmann testified that defendant was sent back to Eastern State for that institution to "supply support systems prior to discharg " and the "maintenance of medication." When asked if defendant could have been discharged into the community during the month of July 1975, the doctor responded: "I can only say that I was surprised when I heard about it."

Dr. Siegmann testified that defendant was aware of the wrongfulness of his action but said that "[t]he patient does not lose all semblance of what he was doing, which means in some ways a vague reality situation is almost always the awareness of a schizophrenic." He testified that defendant could not conform his conduct to the requirements of the law. He explained this by saying that a person in his condition is not "truly in command of his reasoning as a normal person." He becomes the victim of his affect, of which he is neither really aware nor, if he is aware, understands. He is bound to all kinds of impulsive actions which at times earlier he might renounce as "[in]appropriate."

Finally, Dr. Siegmann was asked "what happened to him during the last several years when he has not taken his medication," to which Siegmann responded, "[h]e became psychotic. *Dorland's* defines psychoses as being 'any major mental disorder of organic and/or emotional origin characterized by derangement of the personality and loss of contact with reality . . . .' "

The descriptions given by the sister and other lay witnesses take on new significance, in view of Dr. Siegmann's testimony:

> Q. Doctor, based on your knowledge of Mr. Stacy, if it were brought to your attention that on a given day he had been extremely nervous, could

not stay still, had been laughing and giggling inappropriately, would that indicate to you that his state of schizophrenia was in remission or was it active?

A. I would think it was a recurrence of disintegration.

This medical and lay testimony clearly establishes that defendant was not in remission on the date of the murder because he was not taking his medication, without which he was "basically mentally ill" and "grossly psychotic, grossly ill, grossly mentally ill," or, in the idiom, he "ain't got good sense, he's crazy." The Majority asserts that "[a]t the time of the homicide, however, he had been without medication for only a short period of time, if at all." The only concievable purpose of this assertion is to cast doubt upon the absolute and undisputed fact that defendant was released without medication and was not on medication at the time of the murder.

601 S.W.2d at 699-702.

On this latter point, the former Justice is undoubtedly correct. There is not one shred of evidence in the record that Stacy was taking medication or even had access to medication. All the evidence, in fact, is directly to the contrary.

The State called a single witness in rebuttal, Dr. J. Frank Beasley, a psychiatrist employed by Lakeshore Mental Hospital. In response to a rambling, court-supplemented, lawyer-amended hypothetical question of questionable competence. Dr. Beasley testified that this hypothetical individual realized what he was doing and that it was wrong. All remaining portions of his testimony were properly stricken by the trial judge.

It is significant to note that Dr. Beasley was not asked a single question about remission. It is more significant that the State did not call a single psychiatrist from Central State or Eastern State, where the psychiatric treatment had been given defendant for a substantial portion of the year preceeding the murder.

Normally, the missing witness rule would come into play and an unfavorable inference might be drawn from the State's failure to call an available witness possessing peculiar knowledge of the facts, relying instead on a witness less familiar with them. This is true especially in view of the fact that the State had within its keeping the psychiatrists who administered to defendant during his confinements at the state mental institutions. There is, however, no necessity for relying upon this inference. During oral argument the following colloquy between the Court and counsel for the State occurred:

> The Court: Instead of calling one of those witnesses who had full knowledge of the facts, witnesses who were in the keeping of the state, the state elected to rely upon a hypothetical question propounded to a doctor who hadn't seen him . . . Why didn't the state call a witness, one of its many witnesses who had some knowledge about this man?
>
> Counsel: Well, the many witnesses who had, in fact, examined the defendant testified for the defendant . . . .

We regard this as a devastating admission. The State's own experts clearly and conclusively establish the defendant's insanity defense, leaving the State in the position of relying upon a single doctor who had not even seen him. The defendant's only burden was to establish a prima facie

case of insanity. He did so by offering conclusive proof of insanity; The State made no effort to carry its burden.

601 S.W.2d at 702.

The above-referenced exchange during oral arguments before the Supreme Court will in no way be considered as to the sufficiency of the evidence. But it is part of the record and is some indication of diligence on the part of the state in seeking expert testimony and finding an absence thereof to utilize in their favor.

Dr. Beasley's testimony is crucial to the state's cause. There is no evidence anywhere in the record and no testimony from any witness that Stacy could conform his conduct to the requirements of the law. Dr. Beasley was the witness who was to provide that testimony. But when the question was put to him, his answer was properly excluded by the court as being based, not upon the poorly-worded hypothetical question, but upon personal knowledge. The following is the sole attempt by the state to reach the second prong of the *Graham* test:

Q. Now, doctor, taking that same set of facts, and based on those same assumptions, I will ask you further if you have an opinion as to whether or not the person with the gun could conform his conduct to the requirements of law at that time? Do you have an opinion as to that, doctor?

A. Yes, I think he could have.

Q. You say you have an opinion. State what that opinion is and why?

A. Yes, he could have.

Q. And do you state that within reasonable medical certainty, taking that hypothetical question?

A. Yes.

Q. And for what reasons do you base that opinion, doctor?

A. I base that on reviewing his chart from 1974—

MR. KURTZ: Well, I object and I move to strike his whole testimony if he's basing it on his personal knowledge of this individual—

THE COURT: Wait a minute. Are you basing your opinion on the individual or on the hypothetical question presented to you? Which?

MR. JONES: Your Honor—

THE COURT: Wait a minute, wait a minute. Are you basing your decision, your testimony here today on your personal observations of the individual or on the hypothetical questions submitted? Which?

THE WITNESS: This is somewhat difficult to answer. It sounds like, from what you've told me in this hypothetical situation, that the robbery was planned, attempted—

THE COURT: That's not what I'm asking. Are you basing your answer to the question asked on the hypothetical question as given or on your having observed the individual at one time, because you referred to the individual and his record?

THE WITNESS: I am basing the first part on your hypothetical question and on the second part, on his past history.

MR. KURTZ: I still don't understand his answer.

THE COURT: His answer is that he could have conformed to the requirements of the law.

MR. KURTZ: Well, your Honor, I move to strike that answer—

THE COURT: And he's basing that, he says, on his personal observations and on the records of the defendant.

MR. KURTZ: Well, it's mixed with the hypothetical, so I move to strike his answer completely and ask the jury to disregard that.

MR. JONES: Your Honor, he has given his opinion and—

THE COURT: I know, but he's basing it on something other than the hypothetical question that you asked him and that creates a problem.

Q. Well, doctor, let me ask you this, do you base your—

MR. KURTZ: Would the Court rule on my objection?

THE COURT: I'm going to rule at this time to strike whatever he says about the second portion of the Graham rule.

MR. KURTZ: Thank you, your Honor.

A. The thing is that you are asking me if a total stranger, no one I know, could walk into a bus station and attempt a robbery—

THE COURT: Well, you have already answered that, that in your opinion, you are saying that you believe that individual realized what he was doing?

THE WITNESS: Yes, It shows organized thinking.

> THE COURT: You are all right there but I sustained the motion with respect to the second portion of that.

The doctor's response to the critical question was stricken, but no cautionary instruction was requested or given to the jury. This court affirmatively *searched* the record for evidence, direct or circumstantial, that the state proved that the defendant could conform his actions to the law beyond a reasonable doubt. Not only did the state not prove it beyond a reasonable doubt, there is no proof whatsoever on that essential element of the offense.

There can be no doubt in this case that the burden shifted to the prosecution to prove sanity. Therefore, even if the jury disbelieved the defense witnesses entirely, that would leave the matter in equipoise—no evidence for the defense and no evidence for the prosecution. With the presumption of sanity removed, the state cannot prevail. While ordinarily expert opinion testimony is not conclusive even where it is uncontradicted, *United States* v. *Harper,* 450 F.2d 1032, 1042 (5th Cir. 1971) and expert testimony is in no way binding upon a jury in Tennessee, *Edwards* v. *State,* 540 S.W.2d 641, 647 (Tenn.1976), still, with a case in the posture of the one at bar, it is impossible for a jury to disregard unrebutted evidence of insanity.

In a case in which the trial was similar to Stacy's, the Fifth Circuit Court of Appeals wrote concerning the same test as *Graham* but referred to as the "*Blake* test":

> We have stated that the nature and quantum of rebuttal evidence sufficient to present a jury question is to some degree determined by the strength of the case for insantiy. [Citation omitted.] The defendant presented not slight evidence, but substantial evidence, of his insanity at the time of and with respect to the offenses charged. In rebuttal, the government presented one expert witness whose

> testimony did not actually negate any part of the *Blake* test. As we held in *Brock*, the government must produce something more in order to pass appellate muster.
>
> Here the evidence presented would not permit the jury to "go either way;" there were no "material variations between the experts themselves." [Citations omitted.] . . . We conclude that the government did not present sufficient rebuttal evidence to present a jury question on the issue of the defendant's insanity. In a criminal case, it is not sufficient for the government to produce evidence from which the jury could conclude that the defendant was sane by a preponderance of the evidence. In order to present a question for the jury, the government must produce evidence sufficient to convince a reasonably minded juror that the defendant was sane beyond a reasonable doubt. The government failed in that attempt, and thus the convictions cannot stand.

United States v. *Bass*, 490 F.2d 846, 851—52 (5th Cir. 1974).

In Stacy's case, the state's rebuttal was not insufficient; it was nonexistent. That places the case in the same posture as *United States* v. *Burks*, 547 F.2d 968 (6th Cir. 1977), *rev'd on other grounds*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). There, the Sixth Circuit reversed a conviction where three doctors testified that the defendant could not conform his conduct to the requirements of the law and the government failed to offer rebuttal evidence. The Supreme Court only reversed as to the ordering of a new trial, holding that double jeopardy barred such a trial.

Mention should be made of another rule of criminal law with regard to sanity in Tennessee. In the case of *Forbes* v. *State*, 559 S.W.2d 318 (Tenn.1977) it was held that "when any defendant, suffering from a mental illness that is cyclic, periodic or episodic

in nature, characterized by periods of remission, interposes a plea of not guilty by reason of insanity, it is incumbent upon him to make out a prima facie case of insanity by offering evidence of nonremission at the time of the commission of the crime." *Id.* at 328—29. Stacy's illness might be fairly characterized as being in remission provided that he is under medication. There is, again, no evidence in the record that Stacy was taking, or even had access to, the therapeutic drugs. Dr. Siegmann testified that lay witnesses' descriptions of Stacy on the day of the killing would indicate a "recurrence of disintegration."

However, it is questionable whether the *Forbes* rule applies to the *Graham* test. *Forbes* was tried under the old *McNaughten* rule in Tennessee and the Supreme Court specifically refused to apply the *Graham* standard in *Forbes*. Even if it does apply, however, Stacy made a prima facie showing that he was not in remission. Secondly, if one accepts that he could not conform his conduct to the dictates of the law, he was necessarily not in remission. If the jury chose to disbelieve the latter conclusion, the prima facie showing shifted the burden to the state and, in the absence of rebuttal evidence, the presumption of insanity remains. In either eventuality, *Forbes* cannot be used in this circumstance to shore up an otherwise improper verdict of the jury.

Finally, the court has carefully considered the basis for a finding of sanity proved beyond a reasonable doubt which the three-person majority of the Tennessee Supreme Court utilized. It is believed that Justice Henry once again correctly characterized those conclusions and he will be quoted once again.

> [T]he majority seem[s] to rest their conclusion of sanity on four aspects of this case. First, they say he was aware of what he had done, but we point out that awareness does

not meet the second prong of the *Graham* rule, i.e., the ability to conform his conduct to the requirements of the law.

Next, they say he sought to avoid apprehension and evaded capture for several weeks. The short and simple answer to this is that any fool faced with fear and foreboding can flee and hide. Such is the nature of even a wild beast.

Thirdly, they say he had only a short history of mental illness. The test is not the duration but the fact of legal insanity.

Lastly, they say he was "highly intelligent." There is no insistence that Stacy is stupid—just that he was insane.

601 S.W.2d at 703.

In summary, then, the "due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson* v. *Virginia,* 443 U.S. 307, 316, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560, 571 (1979). Here, an essential element of the offense, i.e., that the defendant could conform his conduct to the requirements of the law, was missing. It was simply absent from the jury's consideration. Asking the question posed by *Jackson,* "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson* v. *Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979), the answer must be that they could not. The court stands with *Jackson* under one arm and *Stacy* under the other; they cannot be resolved consistently. Accordingly, upon the record evidence

adduced at trial and presented to this court, it is held that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The petitioner is entitled to be granted the writ of habeas corpus.

In view of the foregoing disposition of this matter, the remaining grounds raised in support of the petition will not be addressed.

The writ will automatically by stayed pending appeal of this decision.

An appropriate order will be entered.

APPENDIX C

State of Tennessee,
Respondent,
v.
William Earl Stacy,
Petitioner.

Supreme Court of Tennessee.

June 30, 1980.

Petitioner was convicted in the Criminal Court, Knox County, Joseph J. Nigro, J., of murder in the first degree, and he appealed. The Court of Criminal Appeals affirmed, and petition for certiorari was granted. The Supreme Court, Harbison, J., held that: (1) it was for jury to say whether or not, at time of homicide, petitioner had been without medication for a sufficiently long period of time to be unable to control his conduct, and (2) fact that petitioner was seen a substantial period of time subsequent to homicide and recognized and conversed with persons whom he knew, apparently in control of himself, was evidence from which jury could have concluded that petitioner was not psychotic or out of control at time of homicide.

Affirmed.

Henry, J., dissented and filed opinion in which Fones, J., concurred.

1. Homicide (key) 270

Issue of whether petitioner, in addition to appreciating wrongfulness of his conduct, was able to control that conduct was question for jury in prosecution for first-degree murder.

2. Homicide (key) 237

There was ample material evidence in prosecution for first-degree murder to support conclusion of jury that petitioner, in addition to appreciating wrongfulness of his conduct, was able to control that conduct.

3. Homicide (key) 270

It was for jury to say whether or not, at time of homicide, petitioner had been without medication for a sufficiently long period of time to be unable to control his conduct.

4. Homicide (key) 237

Fact that petitioner was seen a substantial period of time subsequent to homicide and recognized and conversed with persons whom he knew, apparently in control of himself, was evidence from which jury could have concluded that petitioner was not psychotic or out of control at time of homicide.

5. Criminal Law (key) 741(4)

Where testimony of expert offered on behalf of petitioner in homicide prosecution was opinion evidence only, its weight and credibility were clearly issues to be determined by jury under appropriate instructions from trial court.

6. Homicide (key) 270

With respect to testimony of physician in homicide prosecution that, if petitioner discontinued his medication, his condition "would disintegrate relatively soon again," it was for jury to say what "relatively soon" meant and to determine whether petitioner's condition had deteriorated on date of crime and extent of such deterioration.

Walter C. Kurtz, Richard McGee, Nashville, Martha Meares, Knoxville, for petitioner.

William M. Leech, Jr., Atty. Gen., Michael J. Passino, Asst. Atty. Gen., Nashville, Ronald A. Webster, Dist. Atty. Gen., John W. Gill, Jr., Asst. Dist. Atty, Gen., Knoxville, for respondent.

OPINION

HARBISON, Justice.

Petitioner was convicted of murder in the first degree and sentenced to life imprisonment in the state penitentiary. The Court of Criminal Appeals affirmed the conviction. Although a number of assignments of error were made in the petition for certiorari to this Court, the petition was granted primarily to consider the sufficiency of the convicting evidence in light of petitioner's defense of lack of mental capacity.

This case involved a planned, deliberate robbery and a murder committed by petitioner in the perpetration of it. Petitioner was driven to the scene of the crime by two other persons. Neither of these individuals claimed mental illness or inability to control his conduct. In the course of attempting to commit the robbery, petitioner shot and killed the intended victim. He was aware of what he had done immediately thereafter, recognized that he had killed the victim, and actively sought to avoid apprehension by the police. He was successful in doing so, even though his two companions were not. Petitioner evaded capture for several weeks. The offense occurred in Knoxville. Petitioner came to Nashville and was seen there on several occasions by persons who had known him previously. He recognized these persons and recalled past events in conversations with them.

Petitioner had a fairly short history of mental illness, dating not from his childhood, but for a period of about one year prior

to the crime in question. There is evidence that he was highly intelligent. It is conceded by counsel for petitioner there was sufficient evidence to make a jury issue in this case as to whether the accused did or did not appreciate the wrongfulnes of his conduct.

Reversal is sought on the other prong of the rules of criminal responsibility as stated in *Graham* v. *State*, 547 S.W.2d 531 (Tenn. 1977); that is, inability of petitioner to control his conduct.

[1] In the opinion of the majority, that issue, like the issue of cognitive capacity, was a question of fact to be determined by the jury. There was evidence that the accused, when he had been removed from medication for a considerable period of time, became completely irrational. At the time of the homicide, however, he had been without medication for only a short period of time, if at all, and his conduct on or about the time of the murder does not compare even remotely with the conduct decribed when he was totally psychotic or out of touch with reality. In our opinion, it was for the jury to determine whether petitioner could or could not control his conduct. If he could not control it at the time when he committed the shooting a few hours earlier, it is difficult to corceive that he could have effectively escaped from a wrecked vehicle and eluded captivity for weeks thereafter—or, at least, a trier of fact might reasonably so conclude from the proof.

[2] The jurors in this case were given full instructions on the rules of criminal responsibility pursuant to *Graham* v *State*, *supra*. Presumably the facts were fully argued to them, as they were to this Court. The jury and the trial judge, all of whom saw and observed the witnesses, concluded that the accused was not incompetent within the *Graham* rules, and in our opinion there was ample material evidence to support that conclusion.

[3,4] Petitioner's case has been before the appellate courts on another occasion. *See State* v. *Stacy*, 556 S.W.2d 552 (Tenn. Cr.App.1977). His drug therapy was discussed in that case. It is clear both from that opinion and from the record in the present case that his ability to control his conduct varied with the degree and extent of medication which he received and the length of time he was without it. In our opinion, it was for the jury to say whether or not, at the time of the homicide, he had been without medication for a sufficiently long period of time to be unable to control his conduct. The fact that he was seen in Nashville a substantial period of time later and recognized and conversed with persons whom he knew, apparently in control of himself, is evidence from which the jury could have concluded that petitioner was not psychotic or out of control at the time of the homicide involved here.

[5,6] The testimony of experts offered on behalf of petitioner was opinion evidence only. Its weight and credibility were clearly issues to be determined by the jury under appropriate instructions from the trial judge. One of these witnesses, Dr. Luton, did not see petitioner until April 1976, over eight months after the homicide in question. The other, Dr. Siegmann, had observed him during the years 1974 and 1975. He testified that on July 1, 1975, petitioner was discharged from the Forensic Services Unit as being improved. At that time petitioner was on medication. Thereafter he was in custody and in the Eastern State Hospital until July 23, 1975. Dr. Siegmann testified that if petitioner discontinued his medication, his condition "would disintegrate relatively soon again." It was for the jury, in our opinion, to say what "relatively soon" meant and to determine whether the petitioner's condition had deteriorated by July 30, 1975, the date of the crime, and the extent of such deterioration, if any. He was out of the hospital and without supervision for only seven days before the murder was committed. Dr. Siegmann did not see petitioner again after July 1 until March 9,

1976, over seven months after the homicide. He expressed the opinion that the accused could appreciate the wrongfulness of his conduct at the time of the crime but that petitioner could not control that conduct or conform it to the requirements of the law. He described the conduct of petitioner when he was in a state of disintegration. The jury was entitled to compare that conduct with the demeanor of the petitioner at or about the time of the robbery and homicide. Further, Dr. Siegmann testified positively that petitioner is not mentally retarded and that his intelligence is well above the average range.

In this Court, the evidence must be viewed in its strongest light favorable to the verdict. It is not the function of this Court to draw inferences from testimony in jury cases. That is the province of the jury whose verdict, in our opinion, was justified from the evidence in the record.

The judgments of the Court of Criminal Appeals and the trial court are affirmed at the cost of petitioner.

BROCK, C. J., and COOPER, J., concur.

HENRY and FONES, JJ., dissent.

DISSENTING OPINION

HENRY, Justice, dissenting.

We granted certiorari in this case for the sole purpose of considering the issue of insanity.

Petitioner was convicted of murder in the first degree and sentenced to serve life imprisonment in the state penitentiary. We find that the defendant's insanity at the time of the commission of the crime was established beyond any reasonable doubt. Accordingly, we would reverse.

The details of the murder are of no significance to the issue under consideration.[1] The offense was committed on July 30, 1975, seven days after the defendant had been discharged from a state mental hospital. He and two companions entered the Knoxville bus station where defendant shot and killed a ticket clerk. All fled and, after being pursued by the police, defendant's two companions were captured. Defendant escaped in a weed field and was captured some three weeks later.

The precipitating factor and proximate cause of this tragic and senseless murder was the action of Eastern State Hospital in releasing this dangerously mentally ill individual, who was hospitalized on court order, *without the knowledge of the court of commitment, without medication and without any arrangement for out-patient or follow-up care.* This slaying occurred seven days after his release, and at a time when he was off medication because none had been prescribed for him.

On January 31, 1977, this Court released its *unanimous* opinion in *Graham* v. *State*, 547 S.W.2d 531, adopting a new and enlightened rule for the determination of criminal responsibility. We pointed out the failure of our courts to address the "nature and quality" pong of the old *M'Naghten* rule relying instead and soley upon the "right and wrong" portion. 547 S.W.2d at 541. We held the *Graham* test to be "essentially a refinement and restatement of the *full M'Naghten* rules." (Emphasis supplied) *Id.*

The opinion the Majority released today erodes the *Graham* rules and effectively takes us back to the old, outmoded and re-

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[1]While we do not choose to belabor the issue we reject the implication of the Majority's assertion that this was a "planned" criminal event. Whatever the activity of his two companions, the defendant did not have the mental ability to plan any course of action or the gumption to carry any plan into execution. Witnesseth the fact that he did not bother to get the money, the fruits of the robbery.

jected "right and wrong" test. In a very real sense it even obliterates *M'Naghten*. In effect, the Majority's action proclaims that the defense of insanity is available only to a criminal defendant who can prove that he is a "wild beast," with the limitation that if he has sense enough to run and hide, he is legally responsible for his criminal conduct.

We submit that this record shows clearly, convincingly and conclusively to a moral and legal certainty that this defendant was legally insane under any reasonable and logical application of any test of criminal responsibility.

We document the record.

I.

Mental Health Background

Defendant's background of hospitalization is significant. He was first admitted to the Forensic Services Division at Central State Hospital on August 13, 1974, from the state penitentiary, where he was serving a sentence for burglary and shoplifting. On October 18, 1974, he was transferred to Eastern State Hospital, from which he was discharged on October 23, 1974. On March 5, 1975, he was again admitted to Central State Hospital from the Criminal Court at Knoxville. On July 8, 1975, an incompetency and commitment hearing was conducted before the Honorable Richard R. Ford, Circuit Judge, and, as a result, on July 10, 1975, he was admitted to Eastern State Hospital for an indefinite period.

Judge Ford testified in this case as a witness for the defense. It was his testimony that based upon his personal observation on July 8, 1975, and on the information available, the defendant was seriously mentally ill. This was twenty-two days before the murder.[3]

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[3] Judge Ford also testified that he was not even notified of the release of this prisoner whom he had committed.

On July 23, 1975, seven days before the murder, defendant was discharged from Eastern State Hospital without medication and without any provision for follow-up care.

II.

Lay Testimony

Defendant's sister, Kathy Stacy, testified that upon discharge defendant was so badly deteriorated that she thought he had escaped and called the hospital to confirm the fact of his discharge. She describes his conduct during the week between the discharge and murder as featuring giggling, laughing inappropriately, nervousness, shaking, staring, and having hallucinations of ghosts. On one occasion he turned out the lights so she could see the ghosts. He randomly broke dishes, walked naked about the house in front of his sister, her children and guests, and put an unloaded pistol against the head of her son and told him he would "blow his brains out." *On the day of the crime* he returned to her house with his "eyes all glittery," laughing, giggling and unable to stand still.

The testimony of Ira Minifee, an indicted accessory, and Regina Mack, both witneses for the State, fully supports defendant's plea of insanity. Their descriptive testimony related to the *very day of the murder* and fully supports the testimony of Kathy Stacy. Further, it is consistent with and corroborative of the observations of the medical experts. In the very teeth of the crucial and undisputed testimony of these three witnesses, and with no evidentiary support in the record, the Majority asserts that "his conduct on or about the time of the murder does not compare even remotely with the conduct described when he was totally psychotic or out of touch with reality."

Reginald Leverette, a fellow prisoner for about four months following the murder, told of defendant's various acts of

bizarre conduct, including a fixation that he was a member of the President's Cabinet, waking from his sleep laughing, and walking about his cell naked with toilet paper sticking out his nose. His testimony states the defendant's condition in terms of thundering eloquence. He says defendant "ain't got good sense, he's crazy."

Stripped of all technical terminology this is precisely what the medical experts say. While this case is, in no sense, wholly dependent upon psychiatric testimony, the testimony of the medical witnesses gave thundering support to the defendant's plea of insanity.

III.

Medical Testimony

John T. Gerdes, Director of the Forensic Services Division at the Middle Tennessee Mental Health Institute,[1] a graduate psychologist with work completed on his doctorate at Vanderbilt, had personally observed and evaluated defendant on each of his three admissions. He confirms the lay witnesses on the glassy stare, the inappropriate laughter, the silly smile and other bizarre conduct.

He described the defendant thusly:

> I considered him to be a *chronic type* mental patient who has periods when his condition is in remission such that he doesn't appear as such outwardly psychotic but he's *always mentally ill.* (Emphasis supplied).

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[1] The present name of Central State Hospital, a designation sometimes used in this opinion to conform to trial usage.

The defendant called Dr. Frank L. Luton, the Assistant Superintendent for Clinical Psychiatric Services at the Middle Tennessee Health Institute. Dr. Luton has practiced psychiatry for forty-eight years. His career has been remarkable. His background includes graduation from the Medical School at Vanderbilt, four years of post-graduate training at Johns Hopkins, training in London, further training in Boston and as a teacher of psychiatry at Vanderbilt. He has been professor emeritus at Vanderbilt since 1963. We consider his testimony to be significant and conclusive.

Dr. Luton was thoroughly familiar with all records pertaining to defendant and had interviewed and evaluated him on numerous occasions. He diagnosed his condition as "schizophrenic, *chronic* undifferentiated type." The word "chronic" is defined in *Dorland's Medical Dictionary,* 25th Edition (1974) as "persisting over a long period of time." Thus, definitionally, no valid comparison may be made with a "cyclic, periodic or episodic" disorder such as we dealt with in *Forbes* v. *State,* 559 S.W.2d 318 (Tenn.1977)

Dr. Luton's testimony sheds substantial light on the medication question. He testified that "[w]hen he's not medicated, he becomes grossly psychotic, grossly ill, mentally ill." He testified that with medication defendant "behaves in a relatively normal fashion," but that he cannot be trusted to take his medication—"[h]e gets the idea that he doesn't need it any longer."

Basing his testimony on his own examinations he voiced the opinion that at the time of the murder defendant "was mentally sick, seriously, at that time." He testified that his condition was "chronic" and that it "goes back to the time when he committed the act and [that] at that time he was *not able to judge the nature of his act."* (Emphasis supplied). Further, he was "not able to conform" his conduct to the requirements of the law. It is evident from Dr. Luton's testimony that defendant is

role played by medication. But "it was very important that his medication be maintained as Mr. Stacy's condition is apt to deteriorate if this is not done." If he were released without medication he "would disintegrate relatively soon again."

Dr. Siegmann testified that defendant was sent back to Eastern State for that institution to "supply support systems prior to discharge" and the "maintenance of medication." When asked if defendant could have been discharged into the community during the month of July 1975, the doctor responded: "I can only say that I was surprised when I heard about it."

Dr. Siegmann testified that defendant was aware of the wrongfulness of his action but said that "[t]he patient does not lose all semblance of what he was doing, which means in some ways a vague reality situation is almost always the awareness of a schizophrenic." He testified that defendant could not conform his conduct to the requirements of the law. He explained this by saying that a person in his condition is not "truly in command of his reasoning as a normal person." He becomes the victim of his affect, of which he is neither really aware nor, if he is aware, understands. He is bound to all kinds of impulsive actions which at times earlier he might renounce as "[in]appropriate."

Finally Dr. Siegmann was asked "what happened to him during the last several years when he has not taken his medication," to which Siegmann responded, "[h]e became psychotic. *Dorland's* defines psychosis as being "any major mental disorder of organic and/or emotional origin characterized by derangement of the personality and loss of contact with reality. . . ."

The descriptions given by the sister and other lay witnesses take on new significance, in view of Dr. Siegmann's testimony:

Q. Doctor, based on your knowledge of Mr. Stacy, if it were brought to your attention that on a given day he had been extremely nervous, could not stay still, had been laughing and giggling inappropriately, would that indicate to you that his state of schizophrenia was in remission or was it active?"

A. I would think it was a recurrence of disintegration.

This medical and lay testimony clearly establishes that defendant was not in remission on the date of the murder because he was not taking his medication, without which he was "basically mentally ill" and "grossly psychotic, grossly ill, grossly mentally ill," or in the idiom, he "ain't got good sense, he's crazy." The Majority asserts that "[a]t the time of the homicide, however, he had been without medication for only a short period of time, *if at all.*" The only conceivable purpose of this assertion is to cast doubt upon the absolute and undisputed fact that defendant was released without medication and was not on medication at the time of the murder.

The State called a single witness in rebuttal, Dr. J. Frank Beasley, a psychiatrist employed by Lakeshore Mental Hospital. In response to a rambling, court-supplemented, lawyer-amended hypothetical question of questionable competence, Dr. Beasley testified that this hypothetical individual realized what he was doing and that it was wrong. All remaining portions of his testimony were properly stricken by the trial judge.

It is significant to note that Dr. Beasley was not asked a single question about remission. It is more significant that the State did not call a single psychiatrist from Central State or Eastern State, where the psychiatric treatment had been given defendant for a substantial portion of the year preceding the murder.

Normally, the missing witness rule would come into play and an unfavorable inference might be drawn from the State's

failure to call an available witness possessing peculiar knowledge of the facts, relying instead on a witness less familiar with them. This is true especially in view of the fact that the State had within its keeping the psychiatrists who administered to defendant during his confinements at the state mental institutions. There is, however, no necessity for relying upon this inference. During oral argument the following colloquy between the Court and counsel for the State occurred:

> The Court: Instead of calling one of those witnesses who had full knowledge of the facts, witnesses who were in the keeping of the state, the state elected to rely upon a hypothetical question propounded to a doctor who hadn't seen him . . . Why didn't the state call a witness, one of its many witnesses who had some *knowledge about this man?*
>
> Counsel: Well, the many witnesses who had, in fact, examined the defendant *testified for the defendant.* . . .

We regard this as a devastating admission. The State's own experts clearly and conclusively establish the defendant's insanity defense, leaving the State in the position of relying upon a single doctor who had not even seen him. The defendant's only burden was to establish a *prima facie* case of insanity. He did so by offering conclusive proof of insanity; the State made no effort to carry its burden.

IV.

Analysis of Proof of Insanity

As the Court of Criminal Appeals correctly noted, "the case was properly tried under the *Graham* Rule." In *Graham* v. *State,* 547 S.W.2d 531 (Tenn.1977), we reviewed the history of the *M'Naghten* tests for insanity. We pointed out that this was a two-pronged test involving (1) knowledge of the nature and quality of the act; and (2) knowledge of its wrongfulness. We

reviewed Tennessee cases starting with *Dove* v. *State*, 50 Tenn. 348 (1871), and pointed out that Tennessee had consistently adhered to the "right and wrong" prong but had never discussed the "nature and quality" portion of the test. This latter portion of the test "calls for something deeper and more vital." 547 S.W.2d at 539.

We adopted the American Law Institute Model Penal Code, Section 4.01 (1962). The test so adopted reads:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to *appreciate the wrongfulness of his conduct* or to *conform his conduct to the requirements of the law.* (Emphasis supplied). 547 S.W.2d at 543.

We recognized in *Graham* that "the phrase 'to appreciate the criminality [wrongfulness] of his conduct' . . . is a substitute for the *M'Naghten* clause 'to know the nature and quality of the act he was doing.' " 547 S.W.2d at 541. Further, we said, the new test was "essentially a refinement and restatement of the full *M'Naghten* Rules," *Id.*, and that "there is not a vast difference between the rule we adopt and the *M'Naghten* Rules *as they should be applied.*" 547 S.W.2d at 543 (Emphasis supplied).

In a word, the *Graham* test was necessitated by a failure of the courts to apply the full *M'Naghten* Rule, concentrating upon "right and wrong" and ignoring "nature and quality." Now we again have two tests, *i.e.*, (1) capacity to appreciate wrongfulness (right and wrong, nature and quality) and (2) capacity to conform one's conduct to the requirement of the law.

It is important to Tennessee criminal jurisprudence that the second prong of the *Graham* test not suffer the same fate as its

M'Naghten predecessor. There is *scant* proof in this record (only Dr. Beasley on hypothetical and Dr. Siegmann's testimony of "vague reality") that defendant had the capacity to appreciate the wrongfulness of his conduct, but there is not even a suggestion that he had the ability to conform his conduct to the requirements of the law. All proof to this point was *contra*.

Dr. Luton testified that defendant was seriously and chronically mentally sick, that at the time he committed the murder "he was not able to judge the nature of his act" and "not able to conform" his conduct to the requirements of the law.

Dr. Higgs testified that even under the *McNaghten* Rule "he would have had an insanity defense."

Dr. Siegmann testified that defendant could not conform his conduct to the requirements of the law. Dr. Siegmann's comment that a schizophrenic "does not lose all semblance of what he was doing, which means in some ways a vague reality situation is almost always the awareness of a schizophrenic," is both interesting and significant in view of the paltry reasons assigned by the State for a finding of sanity in this case.

Tennessee does not subscribe to the "wild beast" test of insanity, under which the defendant is held responsible unless wholly deprived of understanding and memory so as not to know what he was doing. *See* 21 Am.Jur. *Criminal Law*, Section 33, footnote 13(1965). But, it is only by the application of this theory that this conviction *possibly* can stand.

The State insists that defendant was acting as a rational human being because:

a. Twice, after the crime, he stated: "I shot me a m-----f-----."

b. Immediately after fleeing the bus terminal and getting into the car, he wanted the radio on to see if any news of the shooting was being broadcast.

c. He looked back to see if the car was being followed.

d. He escaped from the wrecked car.

e. Dr. Beasley, in answer to a hypothetical question, stated he had knowledge of wrongdoing.

Our colleagues of the majority seem to rest their conclusion of sanity on four aspects of the case. First, they say he was aware of what he had done, but we point out that this awareness does not meet the second prong of the *Graham* rule, *i.e.*, the ability to conform his conduct to the requirements of the law.

Next, they say he sought to avoid apprehension and evaded capture for several weeks. The short and simple answer to this is that any fool faced with fear and foreboding can flee and hide. Such is the nature of even a wild beast.

Thirdly, they say that he had only a short history of mental illness. The test is not the duration but the fact of legal insanity.

Lastly, they say he was "highly intelligent." There is no insistence that Stacy is stupid—just that he was insane. We were not aware that insanity is visited only upon the unintelligent or that the intelligent are insulated against insanity. Indeed, there seems to be a rather marked correlation between intelligence and insanity. It was this known fact that prompted J. Dryden's immortal lines, "Great wits are sure to madness near allied, and thin partitions do their bounds divide."[4]

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[4] J. Dryden, Absalom and Achitophel (1680).

Conceding, *arguendo*, that these facts—and there are no others—established that defendant knew right from wrong, they do not in any sense suggest that he had the capacity to conform his conduct to the requirements of the law.

Defendant not only made out a *prima facie* case, but an overwhelming one.

The burden then, in accordance with the established law, shifts to the State to "establish the defendant's sanity to the satisfaction of the jury and beyond a reasonable doubt." *Graham* v. *State, supra.* This was a heavy burden and the State, with a battery of trained and knowledgeable experts at its beck and call, made no effort to carry it.

Rule 13(e), Tenn.R.App.P., requires that findings of guilt be "set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." This is the mandate of *Jackson* v. *Virginia* 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Upholding the conviction of this defendant ignores these controlling standards.

V.

The Dilemma of the Courts

A.

The courts, when sitting in final judgment in cases wherein insanity is established beyond a reasonable doubt, are confronted with wholly untenable alternatives.

On the one hand, compelling consideration of compassion and basic instincts of human decency are revulsed at punishing an individual whose basic and beginning condition is insanity as

opposed to criminality. On the other, the preservation and protection of society demand that, irrespective of the unfortunate plight of an insane individual, one whose mental condition precludes his ability to conform his conduct to the demands of society should not be released.

In a very real sense the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society.

There are pragmatic reasons that preclude penitentiary confinement. Unto the distressingly overcrowded and understaffed prison system of our state we are committing a troublemaker, a misfit, a man who simply cannot live in a prison environment. These are the people who foment disorder and who are in a large measure responsible for crime within the walls of our state peniteniary.[1]

There is no acceptable choice under the present condition of our law. To punish the innocent is repugnant to our system of justice; to release the dangerously insane upon society is unthinkable. While we respect the view of others, when faced with

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[1] The testimony of Dr. Higgs is relevant:

Q. . . . is there danger of serious harm to others in the event of a relapse?

A. There could be because he could do something foolish like he did before which caused him to get into this difficulty.

Q. So then, without medication then and proper management, without hospitalization sought, this young man stands in danger of harm to himself and others by relapse?

A. That's correct.

This testimony was given at the hearing, *before* the murder, designed to determine compentency to stand trial on another charge.

this dilemma we are left with no choice but to follow the dictates of the law as we understand it, and the law demands that a criminal con iction of the insane may not stand.

The abolition of the defense of insanity is not a viable alternative. Only two states have tried this approach and in each instance abolition was declared unconstitutional. *Sinclair* v. *State*, 161 Miss. 142, 132 So.581 (1931); *State* v. *Strasburg*, 60 Wash. App. 106, 110 P. 1020 (1910).

It is evident that the abolition of the defense would run afoul of due process in that it would deprive defendants of the traditional right to negate proof of criminal intent. The insanity defense is considered one of the fundamental rights of the citizen. It originated during fourteenth century England and has been a complete defense against criminal liability since that early period of the common law; it was established in America at the time our federal constitution was drafted. R. Perkins, *Criminal Law* 851 (2nd ed. 1969).

Thus, the defense is deeply entrenched in our law as one of those immutable principles not subject to change, unless it be at the hands of the Supreme Court of the United States.

B.

A decade or so ago a principle issue facing our courts was the plight of insanity acquittees who were being deprived of their liberty by virtue of being held in mental institutions indefinitely, even though they had been found not guilty of the crime with which they were charged. This deprivation of liberty was addressed and the problem corrected by a trio of cases decided by the Supreme Court. *Jackson* v. *Indiana*, 406 U.S. 715, 95 S.Ct. 1845, 32 L.Ed.2d 435 (1972), *Humphrey* v. *Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972) and *Baxtrom* v. *Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

Primarily as a result of these cases, automatic commitment and prolonged confinement of those found not guilty of criminal charges by reason of insanity are prohibited. *See generally,* German and Singer, *Punishing the Not Guilty; Hospitalization of Persons Acquitted by Reason of Insanity,* 29 Rutgers L.Rev. 1011, 1025 (1976).

Thus, the Supreme Court mandated that civil and criminal committees be accorded the same rights; that acquittal by reason of insanity requires a pre-commitment, due process hearing; that after commitment periodic examinations must be given at reasonable intervals; and that the committed patient must be released when his mental condition is such that his liberation would not lead to further violations of society's rules and his own good requires no further restraint.

Pragmatic considerations tend to frustrate and embarrass these seemingly sound principles. Chief among these is the recurring problem created by "synthetic" or "chemical" sanity, so called because many patients, by use of carefully regulated medication, administered in the protected and sheltered environment of a mental institution, can be restored to sanity. On his release, a patient so restored may live and function as a normal human being so long—but only so long—as he takes his "pills." A careless or deliberate failure to use his prescribed medication frequently is attended by devastating consequences. Thus, another dilemma: two individuals are afflicted by the same mental ailment; one takes his medication and undergoes any prescribed follow-up care; the other does not. The former is restored to productive citizenship; the latter becomes a menace to society. Must both suffer because one cannot and will not conform? It is simple to recognize the problem and pose the question; the solution is more difficult.

At any rate where the problem at one time was how to get insanity acquittees *out* of an institution, the problem now is how to *keep them in*—how to keep dangerous mentally ill criminals

from returning "to the streets" after an all-too-often relatively short stay in a mental institution. While we are in no sense critical of the Supreme Court, we recognize the mammoth problem created by *Jackson* v. *Indiana, supra.*

C.

The Tennessee Legislature has made an effort to meet the thrust of *Jackson.* Section 33-709, T.C.A., provides in substance that when a criminal defendant is found not guilty by reason of insanity, the trial judge shall order his detention "for diagnosis and evaluation for a minimum of sixty (60) days and a maximum of ninety (90) days in a hospital or treatment resource."

Following evaluation, and after certification as provided by Section 33-604(a) T.C.A., the District Attorney is required to petition the court for judicial hospitalization. Section 33-604(c) provides for a due process hearing, with the full panoply of rights. The Court is authorized to commit the defendant if it finds by "clear, unequivacal and convincing evidence:[6]

(1) That the individual is mentally ill and

(2) Because of this illness, poses a likelihood of serious harm . . . and

(3) All available less drastic alternatives to commitment to a mental hospital or treatment resource are unsuitable."[7]

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[6] It should be borne in mind that a finding of not guilty by reason of insanity does not establish the legal status of insanity; its only effect is an adjudication that the State could not establish sanity beyond a reasonable doubt, or phrasing it differently, his mental condition enabled him to negate intent.

[7] This record shows beyond peradventure of doubt that Stacy meets all criteria.

If the defendant does not meet these criteria his immediate release is ordered. Section 33-604(d), T.C.A.

Those knowledgeable in the field of criminal law recognize that the defense of insanity is scorned by prosecuting attorneys, abused by some defense lawyers, viewed with distrust by juries scrutinized with suspicion by many trial judges and tends to fall apart on the appellate level. And yet all concerned must recognize that a person who is truly insane is entitled to fair treatment in a court of law. A resolution of this problem is a matter of critical concern.

D.

We are impressed with the attempted Michigan approach to this problem. While a thorough analysis of the Michigan law is beyond the purview of this dissent, we do feel the need to explore the mechanics of this 1975 enactment.

Michigan law (Mich.Comp.Laws Ann. 768.36) provides for a verdict of guilty but mentally ill. This is an alternative to the conventional verdict of not guilty by reason of insanity. A finding of guilty but mentally ill is permitted in the case of any defendant who asserts a plea of insanity if the trier of fact finds beyond a reasonable doubt:

(a) That the defendant is guilty of an offense.

(b) That the defendant was mentally ill at the time of the commission of that offense.

(c) That the defendant was not legally insane at the time of the commission of that offense.

It should be noted that the Michigan test of criminal responsibility is similar to the *Graham* rule. A finding of insanity is a complete defense. "Mental illness" is defined to be:

> . . . substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. M.C.L.A. Sec. 330.1400a, M.S.A. Sec. 14.800(400a).

This definition falls short of legal insanity. A finding of guilty but mentally ill negates insanity and, therefore, would not destroy the existence of *mens rea*. The defendant, while mentally ill, was not insane and had the mental ability to entertain the requisite criminal intent.

This procedure goes a long way in the direction of solving the dilemma we have discussed. Instead of Tennessee's all-or-nothing approach under which the insane may be confined in the penitentiary or "turned loose on the streets," Michigan juries have a means, in proper cases, to assure the protection of society and simultaneously to provide treatment.

As the Michigan Supreme Court phrased it in *People* v. *McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980):

> Guilty but mentally ill defendants are in a wholly different position than defendants found not guilty by reason of insanity. The former have been found beyond a reasonable doubt to have been 1) guilty of an offense, 2) mentally ill at the time of the commission of the offense, and 3) not legally insane at the time of the offense.
>
> They no longer have a right to unfettered liberty. They have been convicted of a crime. 288 N.W.2d at 917.

Under the Michigan procedure, upon a finding of guilty but mentally ill, sentence is imposed without regard to the defendant's mental condition, *i.e.*, just as if he were mentally sound. Upon commitment to the department of corrections he is evaluated and given psychiatric treatment, which may be pro-

vided by corrections or the department of mental health pursuant to transfer. Provision is made for his return, on cure or remission, to corrections to serve out the balance of his sentence. Thus, he is not released "on the street." As noted in Amarilio, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness,* 12 J.Mar.L.Rev. 351, 369 (1979):

> This in effect creates a revolving door policy. But rather than having the door revolve from a mental facility into the street, it revolves from one secured facility to another, thereby assuring public protection.

Provision is made for parole and for probation.

The Michigan approach perhaps is not ideal. Admittedly the distinction between insanity and mental illness is technical and tedious. It could become confusing to juries; however, this problem could be solved to a large extent by a jury finding of guilt or innocence, with sentencing by the trial judge who could apply medical and lay proof and make the determination.

It is also true that juries—and perhaps judges—and maybe appellate courts—could abuse this law. This, however, can happen under the present system—with far more serious consequences.[4] It is far better that an occasional insane defendant be found to be mentally ill and sentenced than to have the vast majority of insane defendants found guilty and sentenced to the penitentiary to suffer in the darkness of their unenviable plight and abandon hope for the possibility of cure while all potential good in them wastes and withers in the prison air.

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[4] Technically speaking, the Michigan plan of guilty but mentally ill would have availed Stacy naught because he was not mentally ill, but plainly insane and incapable of criminal intent. However, had there been available a middle ground of a finding of guilty but mentally ill, we cannot believe that the jury, the trial judge, or either appellate court would have found sanity.

The Michigan statute has been held constitutional in the face of an attack hinged upon the allegedly indistinguishable definitions of mental illness and insanity. *People* v. *Sorna*, 88 Mich.App. 351, 276 N.W.2d 892 (1979).

The guilty but mentally ill verdict has survived other constitutional onslaughts. *See People* v. *McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980); *People* v. *Darwall*, 82 Mich.App. 652, 267 N.W.2d 472 (1978); *People* v. *Jackson*, 80 Mich.App. 244, 263 N.W.2d 44 (1978).

VI.

Conclusion

We have written at length about the facts motivated by a deep conviction that an insane man is being consigned to the life of a convict because he is insane. All else is secondary.

We have written at length about the problem because we believe it cries out for consideration and solution. To contend for a better brand of justice for insane defendants is an inescapable obligation of the Bench and Bar of this state.

To provide a more humane and realistic law is an inescapable obligation of the Legislature.

It has now been almost three decades since the late Governor Frank G. Clement crusaded for more humane treatment of the mentally ill, characterizing them as "the least among us" and bemoaning the fact that most people like to "give in the sunlight and receive in the dark" and that our state mental patients had no one to lobby for programs of improvement. Under the guiding influence of this "humane" governor, Tennessee made outstanding progress in the care and treatment of the mentally ill. But the law of insanity, an unpalatable and unsavory aspect of the law, in practical application is archaic, antiquated and inhuman.

We voice the hope that the forthcoming General Assembly will appoint a distinguished, knowledgeable and objective commission charged with the responsibility of making an in-depth survey of the defense of insanity to the end that it may formulate rules designed to balance the rights of insane defendants against the interest of the public.

In the meantime, because of the conscientious and deeply held conviction that William Earl Stacy was insane at the time of the commission of murder, we would follow the mandate of the law and dismiss this prosecution, leaving it to the District attorney General to seek hospitalization, and voicing the hope that Stacy would be retained until such time as his release will not pose a danger to the public.

FONES, J., concurs.

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

KNOXVILLE, SEPTEMBER SESSION, 1978

No. 521 KNOX CRIMINAL

William Earl Stacy,
Appellant,

v.

State of Tennessee,
Appellee,

Hon. Joseph J. Nigro, Judge
(First Degree Murder)

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AFFIRMED

OPINION FILED: February 5, 1979

CHARLES H. O'BRIEN, JUDGE

Opinion

(Filed Feb. 5, 1979)

Defendant appeals from his conviction for first degree murder and sentence of life imprisonment in the State Penitentiary.

By the first assignment of error it is insisted on behalf of defendant that the evidence preponderates against his guilt and in favor of a not-guilty verdict by reason of insanity.

Throughout our review of this record two factors predominate. Defendant has an extensive prior criminal record and a lengthy history of emotional disturbance. There is evidence that defendant's criminal record began as a juvenile as

early as 1965.[1] The sequence of admissions to State Mental Institutions began on August 13, 1974, when defendant was first admitted to the Forensic Services division at Central State Hospital from the State Penitentiary where he was serving time. Having completed his sentence he was transferred to Eastern State Hospital on October 18, 1974 and discharged from that institution within a few days. In March of 1975, as a result of another infraction of the law, he was returned to Central State for evaluation from the Knox County Criminal Court. On July 8, 1975 he was declared incompetent to stand trial in the Knox Criminal Court and on July 10th admitted to Eastern State Hospital for an indefinite period. On July 23, 1975 he was discharged from Eastern State without any communication with, or authority from the Knox Criminal Court. On July 30, 1975 he was involved in the homicide for which he was put to trial in this case. Defendant was subsequently committed to and held at various of the State Mental Institutions until immediately preceding his trial when he was returned to the Knox County Jail from the Forensic Services Division at Central State Hospital.

It is defendant's insistence that all of the testimony of both expert and lay witnesses was to the effect that he was emotionally disturbed and that this evidence included testimony relating to his condition on the day of the shooting. Two psychiatrists were called by the defense one of whom testified defendant could not understand the wrongfulness of his act nor conform his conduct to the requirements of the law on the day of the shooting. The other gave his opinion that defendant could vaguely understand the wrongfulness of his act but in no event could conform his conduct to the requirements of the law on the

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[1] Exhibit 5 to the testimony of Dr. Aaron Means, B.E. 292.

fatal day. It is insisted on behalf of defendant that his evidence fully met all the requirements to establish insanity set forth in *Graham* v. *State*, 547 S.W.2d 531, (Tenn. 1977); and that this evidence was not overcome by the State's proof.[1]

We cannot agree. Although all of the expert testimony was to the effect that the defendant does suffer a mental illness, all of the experts were in accord that the nature of defendant's illness is a form of schizophrenia which characteristically results in periods of remission, sometimes occurring naturally and at other times induced by a course of medication. None of the experts were able to say with any degree of medical certainty that defendant was not in a period of remission at the time of the occurrence of the crime. There is a good deal of medical evidence to the contrary. There is not an iota of proof in this record that when defendant disintegrated to a psychotic state he ever exhibited any tendency toward violence, or toward criminal or antisocial conduct. To the contrary, the evidence was that when he was not in a state of remission he was sedentary, remote, hallucinated, and incapable of any organized thinking process which required any mental coordination. On defendant's admission to Eastern State Hospital on July 10, 1975, medical records indicate he had been charged with shoplifting, burglary and larceny. Although he had been found incompetent to stand trial by the trial judge, during his admission interview at the hospital he claimed to have had auditory hallucinations a few months before but was not experiencing them at the time of his hospitalization. He appeared to be completely oriented and there were no overt symptoms of psychosis noted. He appeared cooperative, calm, and well oriented. When interviewed on July

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[1] The McNaughten Rule was in effect on the date of the offense. (McNaughten's Case, 1.C. & K. 130, 10 CL. & F. 200, 8 Eng. Rep. 718, (1843)). However, the case was properly tried under the Graham rule.

15, there were no symptoms of psychosis observed, he appeared in good contact, coherent, well oriented, with appropriate behavior and effect. The medical decision was made to terminate all medication and continue observation. No occurrence of psychotic behavior was observed. His overall effect improved and he was more animated and alert. Because there was no symptoms of psychosis or emotional disorder observed throughout that period of hospitalization he was granted an absolute discharge on July 23, 1975, no medication was prescribed on his discharge, and no aftercare appointment at a mental health center was considered to be necessary. His diagnosis at the time of his discharge from the hospital was "inadequate personality". Defendant continued to function in the community until the day of the shooting, July 30, 1975, and thereafter eluded capture for several weeks. This case is governed by the rule set out in *Forbes* v. *State*, 559 S.W.2d 318, (Tenn. 1977), in which our Supreme Court said:

> "It is our view that when any defendant, suffering from a mental illness that is cyclic, periodic or episodic in nature, characterized by periods of remission, interposes a plea of not guilty by reason of insanity, it is incumbent upon him to make out a prima facie case of insanity by offering evidence of non-remission at the time of the commission of the crime. To hold the general proof of such a mental illness, without proof of non-remission, operates to shift the burden of going forward with the proof to the prosecution, would cast an unfair and impossible burden upon the state."

True, there was also some evidence by lay witnesses relative to the conduct and actions of defendant on and about the day of the crime. We consider the majority of this to be of little value since it came from witnesses who either did not have an adequate opportunity to observe the nature of defendant's conduct, or who were unacquainted with him so there was no way for them

to say that the actions they observed were any different from the actions of this defendant at any other time. The opinion or conclusion of a lay witness must be based upon personal observation or knowledge, and not upon hypothetical facts, nor on what he has heard from others, and stress must be laid upon the facts coming under the observations of the witness in order to determine the weight of his testimony. A non-expert witness does not testify from the same standpoint as the expert, and it is for this very reason that he is required to give the facts upon which he bases his conclusions, so that the jury may say whether his conclusions are warranted by the facts. The opinions of the non-expert are only valuable and competent to the extent that they are supported by the facts and circumstances upon which they are predicated. *Atkins* v. *State,* 105 S.W. 353, 119 Tenn. 453; *Wilcox* v. *State,* 28 S.W. 312, 94 Tenn. 106, p. 112.

When all the evidence available had been heard the issue of whether defendant was or was not in a state of remission at the time of the shooting was a question for the jury. When a guilty verdict is returned, then on appellate review, the sanity issue is the same as the scope of review for any other finding of fact. *Edwards* v. *State,* 540 S.W.2d 641, (Tenn. 1976). All conflicts in the evidence must be resolved in favor of the State's theory. It is apparent that the jury came to the conclusion that any mental illness suffered by defendant in this case did not prevent his knowing the wrongfulness of his act, or render him incapable of conforming his conduct to the requirements of the law, in reference to the homicide at the time it was committed. We overrule the assignment.

Defendant charges error in the admission of testimony of a State's witness relative to certain statements made by a co-defendant who was not on trial and who had not testified.

The statement in question came about in the course of a chase by the police when defendant, the co-defendant Carlton Swift,

and the witness were in the vehicle together attempting to elude the police. The witness was allowed to testify about a remark made by defendant. She was asked about Swift's reaction to defendant's comment. Objection was made on the basis of relevancy. After an off-record bench conference, the objection was overruled. A second objection was made because the statement was hearsay. The witness was allowed to testify that Swift said, "you have the nerve to rob a person, you have the nerve to kill somebody, but you don't have sense enough to wait on the money".

The objection to the admissibility of the statement here is (1) inadmissible hearsay, (2) denial of the right of confrontation. We have examined the authorities cited by defendant and do not find them applicable to the facts of this case. This was not a Bruton violation. There was neither the use, nor misuse, of a confession made in the coercive atmosphere of official interrogation. See *Dutton* v. *Evans,* 400 U.S. 74, 91 S.Ct. 210, p. 219. Although defendant did not raise the confrontation issue in the trial court he was not deprived of that right. No effort was made to cross-examine the witness on the issue of whether Swift had actually made the statement attributed to him. No request was made for any special instruction to the jury in regard to the statement. In *Dutton* v. *Evans, supra,* the United States Supreme Court said:

> "Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject

to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard."

Insofar as the admissibility of hearsay is concerned, the facts of the case also bring the testimony of the witness Regina Mack within the scope of the exception authorizing admission of evidence of a conspiracy. There are other exceptions which would warrant the admissibility of her testimony however we find the objection made by the defendant here to be invalid and overrule the assignment.

Defendant says the evidence at trial preponderates against the finding of murder in the first degree.

This homicide occurred when defendant and Carlton Swift, acting in combination, shot and killed an employee of the Greyhound Bus Company in the bus terminal at Knoxville. There was evidence that each of them had been seen, in the time interval surrounding the homicide, in possession of a gun. The victim was unarmed, there was no evidence of provocation, and the record contains admissions by the defendant that he was the person who committed the act. On appellate review we may only considerthe evidence to determinewhether it preponderates against the verdict. The court is required to take the verdict as having established the credibility of the State's witnesses. *Hoskins* v. *State,* 489 S.W.2d 544, (Tenn. Cr. App. 1972); *Sikes* v. *State,* 524 S.W.2d 483, (Tenn. 1975). Defendant argues there is no evidence of premeditation. Premeditation is a jury question to be inferred from the circumstances surrounding the killing, including the defendant's demeanor, and inculpatory statements made after the incident. See *Sneed* v. *State,* 520 S.W.2d 364, (Tenn. Cr. App. 1974). We overrule the assignment.

Defendant says the jury instruction on expert testimony was improper.

Defendant objected to what he categorized as "a traditional jury instruction on the testimony of expert witnesses" and tendered a special request which was denied. We have read the instructions delivered to the jury by the trial judge and find that the instructions on expert testimony comported with those which have been found acceptable by the appellate courts in this State up until this time. While there has been a trend in some other jurisdictions toward a more liberal construction of proper directions to juries on the consideration of expert testimony we are bound by the dictates of our Supreme Court in such matters. In *Edwards* v. *State*, 540 S.W.2d 641, (Tenn. 1976), cert. den., 97 S.Ct. 784, our Supreme Court had this to say:

> "In this state, 'it is settled beyond question that the weight and value of expert testimony is for the jury and must be received with caution. . . . This applies to the expert opinions of medical men.' . . .Where there is any conflict between expert testimony and the testimony as to the facts, the jury is not bound to accept expert testimony in preference to other testimony, and must determine the weight and credibility of each in light of all the facts shown in [the] case. . . . Expert medical opinion regarding the functioning of the human body must always be more or less speculative. *Id.* at 647. (Citations omitted). See also *Brooks* v. *Rose*, 520 F.2d 775, 778 (6th Cir. 1975)."

Defendant says the trial court erred in allowing the State to introduce nursing notes from hospital records.

Defendant's objection cannot be sustained. The medical records from the Forensic Services Division at Central State Hospital were introduced on behalf of defendant through the qualified custodian of those records. On cross-examination the State sought to read portions of nursing observations of the defendant that had been omitted on direct examination. This evidence was allowed over objection made on behalf of the defendant based on denial of his right to confrontation.

It would impose an unfair burden on the State to allow an accused to initiate evidence of this nature and subsequently deny the State the right of full and proper cross-examination on the same evidence, particularly where all other criteria for the admission of such evidence has been satisfied. To allow to the defendant admission of only that part of the evidence which was favorable to his defense would also deny the jury the benefit of the entire truth in the course of the fact finding process. In introducing evidence of this nature an accused assumes the risk that all of such evidence may or may not be favorable to his cause. When records such as these in question here are introduced the jury is entitled to hear all of the proper evidence which they contain. The evidence introduced by the State was basically observations of defendant's conduct which were made during the course of his hospitalization. We find no error in the admission of this evidence and overrule the assignment.

Defendant says it was error to allow the State to elicit testimony relative to a conversation between a defense attorney and counsel for a State's witness.

Several of the witnesses were represented by counsel because of their possible involvement in the homicide for which defendant was being tried. One of these, Ira Minifee, was a material witness. His attorney was called to testify by defendant in an effort to show Minifee had been offered some benefit or compensation in return for his testimony. On cross-examination this lawyer was questioned in regard to a conversation he had had with one of the defense lawyers relative to whether or not Mr. Minifee should testify. The implication is made here that the State was endeavoring to show some improper conduct on the part of defense counsel. Whether or not this was true, the evidence was collateral to the main issue in this case and should not have been admitted because it was not relative to defendant's innocence or guilt. The trial judge stated that he allowed this evidence into the record because of a question raised

earlier in the trial by counsel for the defendant. After the examination of the witness was concluded, the court fully explained the matter to the jury. The nature of this cross-examination could not possibly have affected the outcome of the trial. Any error existing by admission of this testimony could be no more than harmless, particularly in light of the curative instructions given by the trial judge. We overrule the assignment.

Defendant's contention that the State impeached one of its own witnesses by use of a prior statement made by the witness is not borne out by the record.

When the subject witness was called it was evident she considered herself to be involved in the criminal activities of defendant. She was examined with her counsel present. At the initiation of direct examination she was shown a written statement she had made to the police prior to trial. Despite the reluctance of the witness to testify the statement was not used for impeachment purposes and there is no validity to the defendant's assignment.

The judgment of the trial court is affirmed.

/s/ CHARLES H. O'BRIEN,
JUDGE

CONCUR:

/s/ MARK A. WALKER, Judge

/s/ JOHN K. BYERS, Judge